Supreme Court, U.S.
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In The

Supreme Court of the United States

H. GARLAND EVANS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a telefax written and transmitted by a fraud victim after the fraud has come to fruition, that was neither specifically caused nor intended by the defendant, can satisfy the "in furtherance" element of a wire fraud prosecution?

II. Whether a telefax written and transmitted by a fraud victim, which unilaterally confronts the defendant with a suspected fraud and effectively conveys the victim's intent to contact authorities, constitutes substantial evidence of a wire communication sent "in furtherance" of a scheme to defraud as contemplated by Title 18, U.S.C. section 1343?

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OPINION BELOW

The published opinion of the United States Court of Appeals, Eleventh Circuit, is contained in the Appendix (hereinafter "App.") at pages 1-15.

JURISDICTION

The judgment to be reviewed was entered on December 26, 2006. App. 1-15. Mr. Evans' Petition for Rehearing was denied on January 31, 2007. App. 40. Jurisdiction is conferred on this Court by Title 28, U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

Title 18, U.S.C. section 1343:

> Whoever, having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire . . . communication in interstate or foreign commerce, any writings . . . for the purpose of executing such scheme or artifice shall be fined under this title or imprisoned not more than 20 years, or both.

STATEMENT OF THE CASE

Garland Evans, president of Jagar, was convicted of one count of wire fraud under 18 U.S.C. section 1343, based on a May 22, 1997, telefax from the victim of the fraud, Mark Mayrsohn, president of Produce Direct, Inc. ("PDI"). Jagar was a Bahamian company that imported fresh fruits and vegetables for resale; PDI was a United States wholesaler of fresh fruits and vegetables. The May 22 telefax, sent well after Evans ceased doing business with PDI, was to confirm a meeting Mayrsohn sought with Evans to spur payment of Evans' more than one million dollars of debt to PDI. App. 1-2. Although the jury found Evans guilty on two additional counts based on two subsequent telefaxes from Mayrsohn to Evans, the district court, declaring that "the sufficiency of the evidence [on all counts] presents a close question," granted Evans' post-verdict motion for judgement of acquittal on these counts. App. 16.

The superceding indictment described the "scheme and artifice to defraud" as Evans' 1996 preparation and submission of financial reports falsely bolstering Jagar's financial condition for the purpose of PDI procuring export credit insurance from the Export-Import ("Ex-Im") Bank. App. 45, ¶15-16. It further alleged that Evans failed to disclose Jagar's true financial condition "so that Jagar could continue to purchase, using the line of credit extended by PDI, substantial amounts of fresh fruits and vegetables from PDI, and to delay PDI's efforts to collect on Jagar's escalating outstanding invoices." *Id.* at ¶17. The indictment alleged that Evans falsely represented Jagar's financial condition "[t]o lull PDI and the Ex-Im Bank and prevent them from detecting Jagar's true financial condition and the falsity of Jagar's submitted financial statements. . . ." *Id.* at ¶18. Finally, the indictment alleged

that "[t]hrough this scheme ... Evans caused the outstanding balance owed to PDI ... to add up to approximately $1,075,774.64." *Id.* at ¶19.

Ultimately, the indictment alleged that Evans "did knowingly transmit and cause to be transmitted, for the purpose of executing the aforesaid scheme and artifice to defraud ...," the following telefaxes:

> Count 1 – Mayrsohn's May 22, 1997, telefax to Evans confirming a meeting to discuss the status of outstanding invoices and payments, App. 49-52;
>
> Count 2 – Mayrsohn's June 27, 1997, telefax to Evans enclosing a statement of Jagar's account and requesting payment, App. 53-54;
>
> Count 3 – Mayrsohn's July 3, 1997, telefax to Evans expressing disappointment with the continued delinquent state of PDI's account, App. 55-56.

App. 46-47.[1]

From 1994 to 1997, Jagar became PDI's biggest customer buying $4 million to $6 million of fresh fruits and vegetables per year. App. 18. In 1995, PDI acquired credit insurance from Ex-Im Bank to cover the risk of non-payment by Jagar. App. 2. In mid-1996, in conjunction

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[1] Because the indictment was not returned until May 21, 2002, the government was barred by the statute of limitations from basing its prosecution on earlier wire transmissions, for instance Jagar's September, 1996 submission of the false financial statement to PDI. App. 3 n. 2. Indeed, Mahrsohn's May 22, 1997, telefax to Evans alleged in Count 1 is the earliest wire transmission that could have supported a conviction. *See* 18 U.S.C. §3282(a) (five year statute of limitations).

with its application to renew its policy, PDI requested a financial report from Jagar. *Id.* Jagar produced this report showing that it was profitable through the fiscal year ending June 30, 1996, even though an independent auditor's report in February, 1997, reflected Jagar had lost almost $1,000,000 during that fiscal year. *Id.*

The credit insurance policy was issued effective September 1, 1996, to expire May 1, 1997. App. 2, 19. Besides this time limit to the policy, it insured only 90% of Jagar's unpaid balance up to the sum of $600,000 (thus a payment limit of $540,000), and applied by its terms only to the first $2,000,000 of merchandise invoiced by PDI to Jagar following the policy's effective date. App. 19-20. The policy required PDI to report all arrearages older than 120 days and to make reasonable collection efforts before filing a claim. App. 2.

Jagar regularly purchased $100,000 or more of produce per week. App. 3. Until early 1997, it paid PDI's invoices within about 30 days. App. 3. At that point, Jagar's payments became smaller and its outstanding balance grew from $18,546.20 on January 20, 1997, to $146,382.86 by the end of January, 1997, to $453,089.36 by the end of February, then to $828,012.88 by the end of March, and finally to over $1,100,000.00 by late April, 1997. App. 2, 20-1, 50-52. On April 25, 1997, Jagar ceased doing business with PDI and began purchasing products from a former PDI sales person who had opened his own company. App. 3, 21. Jagar made payments to PDI on May 2 and May 13 totaling approximately $70,000.00. App. 3.

On May 20, 1997, Mayrsohn telefaxed Evans a letter requesting a meeting in the Bahamas to discuss their "business together and its future direction." App. 3, 21.

Mayrsohn then called Jagar's bookkeeper, Diane Fletcher, and scheduled a meeting with Evans for May 26. App. 3. On May 22, Mayrsohn telefaxed Fletcher the following letter which served as the basis for Count 1 of the indictment and Evans' conviction:

> Just a short note to confirm our meeting together with Mr. Evans on Monday at 2:30pm at your offices. For your review I've enclosed some preliminary information, a report of the current receivables with the aging from the invoice date. As discussed, we must stay within 120 days for the Ex-Im Bank. Your account is right now at the limit and we should be receiving your payments now in order to keep up with the schedule. We hope that you are preparing something to send us for this week and can continue to stay within the 120 day Ex-Im requirement. We look forward to a positive and successful meeting together.

App. 3, 49.

On May 23rd, Fletcher telefaxed a letter to Mayrsohn confirming the meeting and listing invoices that needed to be reconciled between the parties. App. 4. At the May 26th meeting, Evans made clear that Jagar would not give PDI any new business or write a check on the spot. But he assured Mayrsohn that Jagar would send another check and pay off its debt. App. 4. On May 30th, Jagar sent PDI a check for $27,511.60 and on June 16th Jagar sent PDI a check for $12,015.90. App. 4. These were the last payments Jagar made leaving an unpaid principal balance of almost $1,100,000.00.

On June 27, 1997, Mayrsohn telefaxed another letter to Evans requesting payment on the outstanding balance. App. 54-55. This was the wire transmission charged in

Count 2 of the indictment. App. 25, 47. On July 3, 1997, Mayrsohn telefaxed Evans another note expressing disappointment with Evans failure to make any further payment and requesting reconciliation of some small spoilage allotments. App. 56-57. This was the basis for Count 3 in the indictment. App. 26, 47.

In passing upon Evans' claim that the evidence against him was legally insufficient, the district court carefully analyzed the conflicting precedents of this Court. Judge Jordan noted that "some decisions say the scheme ends when the perpetrator has accomplished the fraudulent objectives," citing *Kann v. United States*, 323 U.S. 88, 94 (1944), *Parr v. United States*, 363 U.S. 370, 391-2 (1960), and *United States v. Maze*, 414 U.S. 395, 402 (1974). App. 29. He observed "[o]n the other hand, there are cases which conclude that subsequent mailings or transmissions can be in furtherance of the scheme to defraud if meant to 'lull' the victims into a false sense of security," citing *United States v. Sampson*, 371 U.S. 75 (1962) and *United States v. Pereira*, 347 U.S. 1, 5 (1954). App. 29-30.

Judge Jordan stated that the applicable principle was summarized in *United States v. Lane*, 474 U.S. 438 (1986), where this Court stated:

> Mailings occurring after the receipt of the goods obtained by fraud are within the statute if they "were designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place."

App. 30. Noting that "stating this principle is easier than applying it," Judge Jordan cited this Court's 5-4 decision in *Schmuck v. United States*, 489 U.S. 705 (1989):

> [While t]he majority concluded that the mailing of the title-application forms to the state by retail dealers who had purchased cars from the distributor and then sold them to consumers was part of the execution of the "ongoing fraudulent scheme," 489 U.S. at 712 . . . , the dissent thought that the case was controlled by prior decisions like *Kann* and *Maze* . . . [and that the statute] reaches only "those limited circumstances in which the use of the mails *is a part of the execution of the fraud*."

App. 30-31. Judge Jordan concluded his analysis of this Court's conflicting decisions quoting one commentator that the *Kann-Schmuck* line of cases – "with its alternating broad and narrow views of the mailing element – 'fail[s] to provide any real guidance' as to the relationship of the mailing to the fraudulent scheme." App. 31. (citing P. Henning, *Maybe it Should Just be Called Fraud: The Changing Nature of the Mail Fraud Statute*, 36 BOSTON COLLEGE L. REV. 435, 459 (1995) ("if *Schmuck* is the final word, then the mailing element is little more than a nuisance that the government may prove almost as an afterthought in its case")).

In the end, Judge Jordan declared: "If I were writing on a clean slate, I would agree with Justice Scalia's reading of the mailing element in section 1341 and *Schmuck*, would apply the analysis to the wire transmission element in section 1343, and would grant a judgement of acquittal in favor of Mr. Evans on all charges." App. 34-35. But based on Judge Jordan's attempt to reconcile the conflicting

decisions from this Court and the federal courts of appeals, he concluded that Mayrsohn's May 22 mailing was sufficient to support Evans' conviction on Count 1. Although Judge Jordan noted that "[a] reasonable argument c[ould] be made . . . that the scheme ended in late April of 1997, when PDI stopped shipping produce to Jagar and when . . . [the salesperson] took Jagar's account with him to his new company, and that Mr. Mayrs hn's subsequent facsimile transmissions to Mr. Evans were not in furtherance of this scheme," App. 36, he concluded based on the unique facts that the government had proven enough to sustain a conviction. By contrast, as to Counts 2 and 3 (Mayrsohn's telefaxes to Evans requesting payment on June 27 and July 3, 1997, App. 53-56), Judge Jordan held that "any rational stopping point" had been passed "even under the 'lulling' rationale. . . ." App. 38.

Affirming, the Eleventh Circuit Court of Appeals found more certainty in this Court's decisions. It noted that the issue boiled down to whether Mayrsohn's May 22 telefax fell within the lulling doctrine. App. 7. The court rejected Evans' argument that lulling PDI into inaction was not alleged in the indictment citing the allegation that Evans' "falsely represented and caused to be falsely represented to PDI that Jagar was in good financial condition, and that Jagar had the financial ability to pay its escalating outstanding balance to PDI," "[t]o lull PDI and the Ex-Im Bank and prevent them from detecting Jagar's true financial condition. . . ." App. 8-9. It rejected the argument that the lulling doctrine only applies if the defendant continues to perpetrate similar frauds as in a Ponzi scheme citing cases purportedly sustaining this theory where there is only a single victim. App. 9-10. The court rejected the argument that the lulling doctrine

applies to a transmission from a victim only if it was preceded by a lulling communication from the defendant because there were other, earlier communications attributable to Evans that a jury could have found to be lulling. App. 10-11. The court rejected Evans argument that the May 22 telefax "lulled no one but instead advanced the discovery of his fraud" noting that it was the intent, and not the success, of the communication that counted, and that a communication advancing the discovery of the fraud would only not satisfy the "in furtherance" requirement if the victim "recognize[d] the likelihood of fraud and threaten[ed] to sound the alarm if not swiftly satisfied." App. 12. Finally, the court rejected any notion that a particular communication could not support a conviction if it was not "contemplated from the start" of the scheme, urging that "[a]s the execution of the scheme . . . proceeds, new ways may be adopted or invented to effectuate the original design. . . . " App. 13 (quoting *Weiss v. United States*, 122 F.2d 675, 680 (5th Cir. 1941)).

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS, BY APPROVING PETITIONER'S WIRE FRAUD CONVICTION BASED ON A TELEFAX WRITTEN AND TRANSMITTED BY THE ONLY VICTIM OF THE FRAUD, WHICH WAS NEITHER CAUSED NOR INTENDED BY THE DEFENDANT, HAS RENDERED A DECISION UPON A CRUCIAL FEDERAL QUESTION THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS OF APPEALS LIMITING RELIANCE UPON SUCH TRANSMISSIONS TO ONES INITIATED BY THE DEFENDANT OR CAUSED OR INTENDED BY THE DEFENDANT.

Clearly, the jury was allowed to conclude that Mr. Evans committed a fraud. The evidence established that in mid-1996 he submitted financial documents to PDI that misrepresented Jagar's financial condition so that PDI could procure credit insurance and Jagar could continue obtaining products from PDI on credit. But this did not end the inquiry. Evans' submission of these false documents to PDI was not even charged in the indictment because it was barred by the statute of limitations. *See* p. 3 n. 1, *supra*. Only wire transmissions after May 21, 1997 could support Evans' prosecution. By this date Jagar had ceased doing any business with PDI. Indeed, the insurance policy for which the false documents were submitted had long before been obtained and, by its own terms, expired. App. 2, 19-20. Thus, unless Mayrsohn's May 22 telefax to Evans (sent well after the scheme to procure the insurance and continue obtaining product on credit came to fruition) reasonably can be deemed "in furtherance" of any charged efforts of Evans to "lull"

Mayrsohn into inaction, it cannot support Evans' conviction.

Having a uniform construction of the mail and wire fraud statutes is critical to federal law enforcement and our federal criminal justice system. The federal mail and wire fraud statutes have evolved into powerful and prevalent law enforcement and prosecutorial tools. They are used to investigate and prosecute "not only the full range of consumer frauds, stock frauds, land frauds, bank frauds, insurance frauds and commodity frauds, but [also] . . . such areas such as blackmail, counterfeiting, election fraud, and bribery." Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 772 (1980). "In addition, prosecutors use these statutes to prosecute money laundering and Racketeer Influenced and Corrupt Organizations Act ("RICO") violations." Sean Hewens, *Mail and Wire Fraud*, 40 AMER. CRIM. L. REV. 825, 826-7 (2004). These statutes are used as a "first line of defense" or "stopgap" device to permit the prosecution of newly invented frauds until Congress enacts particularized legislation. *Id.* Thus, uniformity is essential not only to guide law enforcement officers, prosecutors, and the courts, but to protect a broad array of constitutional rights of potential targets of these criminal investigations and prosecutions.

Despite Judge Jordan's diligent efforts to navigate the landscape of this Court's mail and wire fraud jurisprudence construing the "in furtherance" element of these offenses, Evans submits that this Court's decisions are contradictory and confounded. As the commentator quoted by Judge Jordan asserted, this line of cases, "with its alternating broad and narrow views of the mailing element – 'fail[s] to provide any real guidance' as to the relationship of the mailing to the fraudulent scheme." App.

31. Although the Eleventh Circuit Court of Appeals cleverly distinguished Evans' arguments that he cannot be punished under the wire fraud statute for a letter that (1) he neither wrote, sent, caused, nor intended, (2) post-dated accomplishment of the alleged scheme to defraud, and (3) did little more than confront him with his more than one million dollars of overdue debt, its decision conflicts with the relevant decisions of this Court and ones of other federal courts of appeals.

It is fundamental that criminal statutes such as 18 U.S.C. section 1343 must be strictly construed to avoid extension beyond the limits intended by Congress. *See, e.g., United States v. Emmons*, 410 U.S. 396, 411 (1973); *United States v. Brown*, 79 F.3d 1550, 1559 (11th Cir. 1996). The application of this rule ensures fair warning as to what conduct is criminal tc comport with due process. *See United States v. Lanier*, 520 U.S. 259, 265-6 (1997). Additionally, most frauds are covered by state law. *See United States v. Kann*, 323 U.S. 88, 95 (1944); *United States v. Walters*, 997 F.2d 1219, 1223 (7th Cir. 1993). In the interest of federalism, Congress traditionally has been reluctant to define as a federal crime conduct that is already denounced as criminal by the states. *See United States v. Bass*, 404 U.S. 336, 349 (1971). Thus sections 1341 and 1343 reach only those frauds "in which the use of the mails [or wires] is *a part of the execution of the fraud.*" *See Kann* at 95; *Walters* at 1222 (emphasis added). As this Court pointed out in *United States v. Maze,* 414 U.S. 395 (1974):

> Congress could have drafted the [wire] fraud statute so as to require only that the [wires] be in fact used as a result of the fraudulent scheme. But it did not do this; instead, it required that

> the use of the [wires] be "for the purpose of executing such scheme or artifice. . . ."

Id. at 405.

The "for the purpose of executing" element of wire fraud "involves an inquiry into whether the 'transmissions were sufficiently closely related to [the] scheme.'" *United States v. Castile*, 795 F.2d 1273, 1278 (6th Cir. 1986) (quoting *Maze*, 414 U.S. at 399). In order for a mailing or wire transmission to be in furtherance of a scheme, it must be " 'incident to an essential part of the scheme' or 'a step in the plot.'" *United States v. Adkinson*, 158 F.3d 1147, 1163 (11th Cir. 1998) (quoting *Schmuck v. United States*, 489 U.S. 705, 710-11). "A mailing furthers a scheme when 'the mails are used prior to, and as one step toward, the receipt of the fruits of the fraud.'" *Id.* (quoting *Kann*, 323 U.S. at 94). Stated differently, the mailing or wire must be "an integral part of the . . . scheme. . . ." *United States v. Toney*, 598 F.2d 1349, 1353 (5th Cir. 1979). The "mailing in execution of the scheme" requirement may be satisfied by "letters designed to conceal a fraud, by lulling a victim into inaction. . . . [But l]etters mailed after a scheme has reached fruition cannot have been 'for the purpose of executing' a scheme within the meaning of 18 U.S.C. section 1341." *United States v. Georgalis*, 631 F.2d 1199, 1204 (5th Cir. Unit B 1980). *Accord Maze*, 414 U.S. at 403; *United States v. Pietri Giraldi*, 864 F.2d 222, 224 (1st Cir. 1988); *United States v. Henderson,* 425 F.2d 134, 141 (5th Cir. 1970) (citing *United States v. Sampson*, 371 U.S. 75, 80-81 (1962).

"The mailing is not an execution of the scheme if use of the mails is only collateral or incidental to the scheme, or made after the scheme has been fully consummated or

has 'reached fruition.'" *Henderson*, 425 F.2d at 141 (citing *Parr v. United States*, 363 U.S. 370, 393 (1960)); *Kann*; *Gordon v. United States*, 358 F.2d 1112, 1115 (5th Cir. 1966); *Getchell v. United States*, 282 F.2d 681, 684 (5th Cir. 1960)). Additionally, "[i]f the purpose of [a communication] conflicts with, rather than promotes, the scheme, . . . the [communication] cannot support a conviction under section 1343." *Pietri Giraldi*, 864 F.2d at 224 (citing *Castile*, 795 F.2d at 1278); *Maze*, 414 U.S. at 402-3; *United States v. Staszcuk*, 502 F.2d 875, 880-1 (7th Cir. 1974), *modified on other grounds*, 517 F.2d 53 (7th Cir.) (*en banc*), *cert. denied*, 423 U.S. 837 (1975); *United States v. Wormick*, 709 F.2d 454, 462-3 (7th Cir. 1983). Communications which "could only . . . lead to the discovery" of the fraud, which "increase [] the likelihood that the defendant would be apprehended," or which are for "the sole purpose of defeating the scheme" are not "in furtherance" of the fraud. *Pietri Giraldi* at 225 (citing *Maze*, 414 U.S. at 403); *Castile*, 795 F.2d at 1279-81; *United States v. Otto*, 742 F.2d 104, 109 (3rd Cir. 1984); *United States v. LaFerriere*, 546 F.2d 182, 187 (5th Cir. 1977). This description of the "in furtherance" element suggests, contrary to Judge Jordan's observation, App. 30, that these principles are just as difficult to state as apply.

As the Eleventh Circuit panel noted below, the lulling theory upon which it affirmed Evans' conviction appears to have been born in this Court's decision in *United States v. Sampson*, 371 U.S. 75 (1962). App. 7-8. There, the defendants, officers, directors, and employees of a large nationwide corporation that purported to help business men obtain loans or sell their businesses, made lavish promises to induce the payment of an "advance fee." *Id.* at 76-7. The indictments specifically alleged that after collection and

conversion of these fees, the defendants would mail the victims an accepted application "for the purpose of lulling said victims by representing that their applications had been accepted and that the victims would therefore perform for said victims the valuable services which the defendants had falsely and fraudulently represented that they would perform." *Id.* at 78. Thus, "the indictment alleged that the scheme, as originally planned by the defendants and as actually carried out, included fraudulent activities both before and after the victims had actually given over their money to the defendants." *Id.* Relying on this Court's prior decisions in *Kann* and *Parr*, the district court dismissed the mail fraud counts based on the defendants' mailings of the victims' accepted applications reasoning that, "since the money had already been obtained by the defendants before the acceptances were mailed, these mailings could not have been 'for the purpose of executing' the scheme." *Id.* at 79.

Reversing, this Court stated it found nothing in *Kann* or *Parr* to suggest that it had established an "automatic rule that a deliberate, planned use of the mails after the victims' money had been obtained can *never* be 'for the purpose of executing' the defendants' scheme." *Id.* at 80 (emphasis added). This Court noted that it had only found in *Kann* and *Parr* "that under the facts in those cases the schemes had been fully executed before the mails were used." *Id.* It further observed that the indictment had specifically alleged that the scheme involved sending the victims the accepted applications "for the purpose of lulling them by assurances that the promised services would be performed." *Id.* at 81. Thus, the government having alleged and proven these mailings in furtherance of the alleged scheme, the jury was entitled to find that the

mailings were for the purpose of executing a scheme within the mail fraud statute. *Id.*

In *Kann*, the defendants devised a scheme to divert profits of Triumph Explosives, Inc., a company of which they were principals or employees, to another corporation, Elk Mills Loading, from which the profits would be distributed to them as salaries, dividends, and bonuses. *Id.*, 323 U.S. at 89-90. The scheme was ongoing. The mailings for which the petitioner was convicted were those of the bank securing payment on the checks it had cashed for the petitioner from the drawee banks. *Id.* at 93-4.

This Court reversed the petitioner's conviction. Although under the alleged scheme the defendants expected to receive further bonuses and profits for which the clearing of checks in the ordinary course would be an essential part, this Court held that "the scheme was completely executed as respects the transactions in question when the defendants received the money intended to be obtained by their fraud. . . ." *Id.* at 95.

> The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It can not be said that the mailings in question were for the purpose of executing the scheme, as the statute requires.

Id. at 94.

In *Parr*, the defendants were, *inter alia*, members and employees of a school board. *Id.*, 363 U.S. at 371-2, 380. The alleged scheme was to defraud the school district and

its tax payers by, *inter alia*, obtaining gasoline and other products and services for personal use through the unauthorized use of a school district gasoline credit card. *Id.* at 382. The mailings charged in the indictment were two invoices from the oil company to the school district after the products and services had already been obtained and a check from the school district to the oil company to pay for one of the invoices. *Id.* at 392-3. Reversing, this Court relied upon *Kann* for its conclusion that the scheme had reached fruition when the defendants received the goods and services and that the charged mailings simply were not for the purpose of executing the scheme. *Id.*

In *Pereira v. United States*, 347 U.S. 1 (1954), this Court went the other way and affirmed the defendants' convictions. The alleged scheme was to defraud a wealthy widow Pereira had just married out of a $35,000.00 check drawn from the wife's Los Angeles bank account and cashed by the defendants in an El Paso bank. *Id.* at 5, 8. This Court noted that the defendants did not deny the plan to defraud Pereira's wife, that collecting the proceeds of the check was an essential part of the scheme, and that the check was delivered to the El Paso bank. *Id.* at 8. The evidence established that the check was mailed from Texas to California in the ordinary course of business. *Id.* This Court held that that mailing was sufficient to support Pereira's conviction upon the following reasoning: "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes the mails to be used.'" *Id.* at 8-9 (citation omitted).

In *United States v. Maze*, 414 U.S. 395 (1974), this Court seemed, again, to change course and affirmed the

court of appeals' reversal of the defendant's mail fraud conviction. The scheme to defraud consisted of the defendant unlawfully obtaining possession of another's credit card, falsely presenting himself to merchants as the owner of the card, and obtaining goods and services on this basis. *Id.* at 396. The four mail fraud counts were based on the merchants' acts in mailing the sales slips to the bank which issued the credit card which, in turn, would mail them to the credit card owner. *Id.* Significantly, "[t]he indictment also charged that the delay in this mailing would enable [the defendant] to continue purchasing goods and services for an appreciable period of time." *Id.*

Notwithstanding the allegation that part of the scheme was that the delay in the mailings would allow the defendant to continue fraudulently obtaining goods and services, this Court held that the scheme "reached fruition" when the defendant checked out of the motels for which he paid by fraudulently using the credit card. *Id.* at 400. It reasoned that there was "no indication that the success of [the defendant's] scheme depended in any way on [the subsequent mailings which were intended to determine] which of his victims ultimately bore the loss." *Id.*

In this Court's next decision on this issue, it affirmed the defendants' convictions in *United States v. Lane*, 474 U.S. 438 (1986). The defendants were charged in Counts 2-4 with mail fraud in connection with insurance claims made for fire damage to a duplex that he had hired a professional arsonist to burn. *Id.* at 440-1. The indictment charged an overall scheme to defraud based on events surrounding this fire. *Id.* at 453. The individual counts alleged separate mailings of proof-of-loss claims to the insurer's headquarters that followed issuance of payment

drafts to the defendants. *Id.* at 440-41. The defendants argued that these mailings post-dated the irrevocable receipt of the related payments and, thus, occurred after the scheme to defraud had come to fruition. *Id.* at 452. This Court rejected the argument asserting that the indictment alleged an "overall scheme to defraud based on the events surrounding the duplex fire." *Id.* It held that the jury could have found that the scheme was not complete until receipt of the last payment thus placing the earlier mailings charged in the other two counts well within the continuing scheme. It held that the jury also was entitled to find that the mailing of the final proof-of-loss claim, two days later, was intended to "lull" the insurer into a false sense of security.

In this Court's most recent word on this matter, Justice Blackmun could only garner five votes to affirm the defendant's conviction. In *Schmuck v. United States*, 489 U.S. 705 (1989), the defendant was accused of orchestrating a scheme to purchase used cars, roll back their odometers, and then sell the automobiles to retail dealers for prices artificially inflated because of the low-mileage readings. *Id.* at 707. Each of the twelve mail fraud counts consisted of an automobile retailer's mailing of a title-application form to the Wisconsin Department of Transportation on behalf of the retail customer. *Id.* The defendant argued that the mailing element of the offense could not be satisfied by the "routine and innocent" mailings of the automobile retailers which occurred after the fraud had come to fruition, were merely tangentially related to the fraud, and were ultimately counterproductive to the fraud. *Id.* at 711.

Rejecting this argument, the majority immediately turned to the scope of the scheme to defraud alleged in the

indictment noting that it was "a fairly large-scare operation" and "an ongoing fraudulent venture." *Id.* at 711. It reasoned that a jury could have concluded that the success of the scheme depended upon Schmuck's continuous harmonious relations with, and good reputation among, retail dealers, which in turn required the smooth flow of cars from the dealers to their Wisconsin customers." *Id.* at 711-12. Likewise, the jury could have found that the title-registration mailings were an essential part of the scheme which did not reach fruition until the retail dealers resold their cars and effected transfers of title. *Id.* at 712. "[A]lthough the registration-for mailings may not have contributed directly to the duping of either the retail dealers or the customers, they were necessary to the passage of title, which in turn was essential to the perpetuation of Schmuck's scheme." *Id.* This Court distinguished *Kann, Parr,* and *Maze* asserting that their mailings "involved little more than post-fraud accounting among the potential victims of the various schemes, and the long-term success of the fraud did not turn on which of the potential victims bore the ultimate loss." *Id.* at 714.

Justice Scalia, quoting *Kann,* highlighted for the dissenters "that the mail fraud statute reaches only 'those limited instances in which the use of the mails is a part of the execution of the fraud. . . .'" *Id.* at 722. It "does not establish a general federal remedy against fraudulent conduct with use of the mails as a jurisdictional hook. . . ." *Id.* at 722-3.

> In other words, it is mail fraud, not mail and fraud, that incurs liability. This federal statute is not violated by a fraudulent scheme in which, at some point, a mailing happens to occur – nor even by one in which a mailing predictably and

> necessarily occurs. The mailing must be in furtherance of the fraud.

Id. at 723. Justice Scalia found that *Kann* and *Maze* were "squarely in point" where this Court reversed the defendants' convictions despite the certainty, and the defendants' knowledge, that the instrument that allowed them to reap the fruits of their frauds ultimately would be deposited into the mail. *Id.* Likewise, Justice Scalia found *Parr* to be indistinguishable in holding that "the indispensability of such mechanical mailings, not strictly in furtherance of the fraud, is not enough to invoke the statute." *Id.* at 724.

This line of cases, that allowed such starkly divergent views as emerged in *Schmuck*, is in need of re-examination and reconciliation. If *Kann*, *Parr*, and *Maze* have been effectively overruled, this Court should definitively say so. If, on the other hand, a fraud can only be prosecuted under the federal wire fraud or mail fraud statutes if the transmission is truly intended by the defendant "for the purpose of executing such scheme or artifice," then the types of incidental, after-the-fact mailings and transmissions that were approved in *Pereira*, *Lane*, and (narrowly) in *Schmuck* should be expressly denounced. Does it matter in evaluating whether a transmission was "in furtherance" of the fraud if the scheme was discreet and against a single victim, as in the instant case, or was a large-scale, ongoing operation as in *Sampson*, *Kann,* and *Schmuck*? Does it matter if the communication was transmitted by the defendant or, instead, by the victim or a third party? As Judge Jordan noted, the *Kann-Schmuck* line of cases fails to provide any real guidance to the essential relationship of the mailing to the fraudulent scheme. App. 31.

Assuming a singular, unified principle can be gleaned from these opinions, the panel decision below conflicts with these decisions. First, to support its ultimate conclusion that Evans' scheme had not reached fruition by the time of the May 22 telefax, the court rejected any notion that "a scheme to defraud necessarily reaches fruition" when the defendant receives the "fruit" of his fraud. . . . App. 6. However, as this Court made clear in *Kann*, a scheme reaches fruition when the "[p]ersons intended to receive the money ha[ve] received it irrevocably." *Id.*, 323 U.S. at 94. *See Maze*, 414 U.S. at 396-7, 400 (affirming reversal of defendant's mail fraud conviction where defendant enjoyed fruits of fraud before mailing, quoting principle from *Kann* that scheme reaches fruition upon irrevocable receipt of money from fraud). Thus, where Evans had irrevocably received all of the fruits of his fraud well before Mayrsohn's May 22 telefax, the fraud had reached fruition and the telefax was utterly "immaterial to . . . any consummation of the scheme. . . ." *Kann* at 94.

Second, while the court relied heavily upon *Sampson* to support its application of the lulling doctrine, App. 7-8, in *Sampson*, the government very specifically alleged as part of the scheme to defraud an intent to lull the victims "by representing that their applications had been accepted and that the defendants would therefore perform aforesaid victims the valuable services which the defendants had falsely and fraudulently represented that they would perform." *Id.*, 371 U.S. at 78. Although the panel below rejected Evans' argument that the superceding argument failed to allege that his scheme included lulling PDI into inaction, App. 8-9, a careful reading of the indictment reflects an absence of any allegation that reasonably contemplated Mayrsohn's May 22 telefax. The only part of

the fraud that was alleged to involve lulling was that Evans "falsely represented and caused to be falsely represented to PDI that Jagar was in good financial condition, and that Jagar had the financial ability to pay its escalating outstanding balance to PDI." App. 46, ¶18. Plainly, Mayrsohn's May 22 telefax was not an act falsely representing, or causing to be falsely represented, Jagar's good financial condition. If this telefax lulled at all, it did not lull in the way alleged in the indictment. Thus, the panel below could not rely upon the express allegations of the indictment to garner support from *Sampson* or affirm Evans' conviction.

Perhaps most of all, the decision below conflicts with *Maze*. As in *Maze*, but unlike, for instance, *Sampson* or *Schmuck*, Evans' fraud was discreet and involved a single victim. Like the defendant in *Maze,* but unlike, for instance, the defendants in the ongoing frauds of *Sampson* and *Schmuck*, by the time of the alleged mailing, Evans had irrevocably received the fruits of his fraud. Likewise, as in *Maze*, Mayrsohn's May 22 telefax post-dated fruition of the fraudulent scheme and could only reasonably be interpreted as undermining the scheme by increasing the probability that it would be detected and Evans apprehended. Plainly, by the time Evans had terminated ongoing business with PDI and had slowed his payments on his 1,000,000.00 plus debt to a trickle, Mayrsohn had more than just an inkling that he had been taken. Mayrsohn's declaration that Evans "must stay within 120 days," App. 49, the limit at which his account was already at or beyond, clearly conveyed that Mayrsohn imminently would be pursuing unilateral remedies. There was nothing "lulling" about this communication. Although under nearly identical circumstances the defendant's conviction in *Maze*

was reversed, the court below affirmed Evans' conviction. Thus, to reconcile the decision below with this Court's cited precedents, this Court should grant review.

Not surprisingly, this Court's line of cases has given birth to a zig-zag of federal courts of appeals decisions. They, too, are difficult to reconcile. The decision below conflicts with several of them. For instance, in *United States v. Georgalis*, 631 F.2d 1199 (5th Cir. Unit B 1980), the defendant's scheme was to attract people to invest in his company which manufactured a smokeless, odorless fuel for decorative lighting which was said to burn in all the colors of the rainbow. The fuel did not live up to this representation. *Id.* at 1201. The defendant also falsely represented that a sophisticated program for development, marketing, and distribution of the product would be employed. The defendant raised over one half million dollars but diverted 60% of these funds to other businesses in which he was involved. *Id.* The mail fraud charges were based on nine letters mailed after the defendant received the money from his fraudulent scheme. *Id.* at 1202. The court held that five of the letters, apparently written by the defendant or his employees, were "lulling" letters, ones "designed to either allay suspicions, or to solicit further funds," *Id.* at 1204-5, and supported the verdicts on those counts. But the court held that two other letters sent by victims, one "recounting the promises so far unkept, made by [the defendant]," and the other "threatening to take legal action," were insufficient because they were not "in furtherance of the scheme to defraud." *Id.* at 1205.

In *United States v. LaFerriere*, 546 F.2d 182 (5th Cir. 1977), the defendants were charged with mail fraud in connection with a scheme to defraud through a sham corporation held out to be in the mortgage commitment

business. *Id.* at 183. Prospective borrowers would pay one point up front to the sham corporation. The defendants would then "put off" borrowers who discovered that their escrowed funds had been used before issuance of any commitment. *Id.* at 184. The mailing consisted of a letter sent by one victim's attorney demanding a letter verifying that the initial deposit was still being held in escrow and threatening that, if the requested letter was not received, the attorney would pursue all remedies on behalf of his client. *Id.* at 185 & n.3.

The government urged that "lulling victims into a false sense of security was an essential part of the instant scheme and that since the [attorney]'s letter was incidental to this essential aspect, the mailing was 'in execution' of the scheme." *Id.* Rejecting this argument, the court noted that "the close relation of the mailings to the scheme does not turn on time or space, but on the dependence in some way of the completion of the scheme or the prevention of its detection on the mailings in question." *Id.* at 187 (footnote omitted). Reversing the defendant's conviction, the court held that since "[t]he only likely effect of the [attorney] letter would be to further detection of the fraud or to deter its continuation," it was not in execution of the scheme to defraud. *Id.* at 187.

In *United States v. Castile*, 795 F.2d 1273 (6th Cir. 1986), the court reversed the defendant's mail fraud conviction which was based upon a scheme to collect insurance proceeds for the defendant's failed restaurant that was intentionally burnt and destroyed. *Id.* at 1274-5. The mailings concerned various letters sent between investigators, adjusters, and attorneys concerning the insurance company's investigation of the fire and the defendant's claims. *Id.* at 1275-7.

In support of its argument that the letters were "for the purpose of executing" the defendant's arson scheme, the government argued that the defendant anticipated the insurance company's investigation. *Id.* at 1279. The court observed that "[t]he foreseeability of a use of the mails is not directly relevant to whether that use was 'for the purpose of executing' the fraud." *Id.* Instead, the court identified the issue as "whether the scheme's completion or the prevention of its detection depended in some way on the mailings which formed the basis of the indictment." *Id.* Bearing this in mind, the court held that none of the charged mailings, consisting of letters internal to the insurance company's investigation of the defendant's claim, was for the purpose of concealing the fraudulent scheme or lulling the victims into a false sense of security. *Id.* at 1279-80. Ultimately, the court held that "where the purpose of the mailings was to defeat a fraudulent scheme, . . . application of the mail fraud statute [is precluded]." *Id.* at 1281.

By contrast to these cases, in *United States v. Toney*, 598 F.2d 1349 (5th Cir. 1979) (*Toney I*), the defendants' fraudulent scheme was to sell dehydrated food chip franchises to victims by misrepresenting the potential profits. *Id.* at 1351. The scheme included various strategies to evade complaints and requests for refunds including using fictitious names and responding to complaints with misrepresentations designed to lull complaining investors into believing that promises made at the time of the initial investments would be kept. *Id.*

The defendants argued that two letters sent by an attorney for one of the disgruntled investors were not in furtherance of the scheme. These letters accused the defendant's company of fraudulent misrepresentations and

threatened legal action. *Id.* at 1352. This time, affirming the defendant's conviction, the court held that where part of the scheme was to further mislead complaining victims, even letters from a victim seeking to redress his dissatisfaction, reasonably foreseeable by the defendant, could constitute a mailing in furtherance of the scheme. *Id.* at 1353-5. *See also United States v. Toney*, 605 F.2d 200, 206-7 (5th Cir. 1979) (*Toney II*) ("Post-purchase mailings which are designed to lull the victim into a false sense of security, postpone inquiries or complaints, or make the transaction seem less suspect are mailings in furtherance of the scheme") (citation omitted).

United States v. Brewer 807 F.2d 895 (11th Cir. 1987), involved another rather fraudulent Ponzi scheme with a non-existent gold fund. The question was whether, *inter alia*, four demand letters sent by victims to the defendant were "in furtherance of" the scheme. Affirming the defendant's conviction, the court held:

> The jury could . . . infer that the letters were mailed in furtherance of the scheme which was designed so that the investors' early demands for repayment were delayed for a sufficient time to allow Brewer to repay them by using monies which were received as more and more victims later contributed to the bogus gold fund.

Id.

These cases continue this Court's struggle with defining and applying the "in furtherance" element of the mail and wire fraud statutes. Like this Court's precedents, they provide alternately broad and narrow views of this element. While the cases *LaFerriere*, *Castile*, *Georgalis* strongly support reversal of Evans' conviction,

the decisions in *Toney I*, *Toney II*, and *Brewer* were relied upon by the district court, App. 36-38, and later by the Eleventh Circuit, App. 9 n. 6, 10 n. 8, to support his conviction. Thus, these decisions conflict in material respects. Additionally, the decision of the Eleventh Circuit below conflicts with, at least, *LaFerriere*, *Castile*, and *Georgalis*.

The letter upon which Mr. Evans' conviction teeters has, at best, a tenuous connection to the scheme to defraud alleged in the indictment. It had no relation to the false financial statement Evans sent long before to PDI. It did nothing to assist Evans in procuring the product he previously sought on credit. As emphasized above, he did not write or send this letter. It clearly was not a "lulling" letter caused by Evans. To the contrary, the letter constituted a unilateral effort by Mayrsohn to confront Evans with his staggering outstanding debt and to inform him that he had reached "the limit." It is only by the misapplication of the difficult to reconcile caselaw on this issue that Evans' conviction was sustained. To correct this miscarriage of justice and elucidate the law under these important and frequently used criminal statutes, this Court should review the decision below and reverse Mr. Evans' conviction.

CONCLUSION

For these reasons, Petitioner respectfully prays that this Court grant its Writ of Certiorari.

Respectfully submitted,

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[PUBLISH]

473 F.3d 1115

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-10624

D.C. Docket No. 02-20451-CR-AJ

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HUBERT GARLAND EVANS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(Filed December 26, 2006)

Before PRYOR and FAY, Circuit Judges, and STEELE,* District Judge.

STEELE, District Judge:

Appellant Evans was convicted of wire fraud under 18 U.S.C. § 1343, based on a May 22, 1997 telefax from the victim to Evans. The sole issue presented is whether the

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* The Honorable William H. Steele, United States District Court for the Southern District of Alabama, sitting by designation.

jury was entitled to find that Evans caused this telefax to be sent "for the purpose of executing" the scheme within the contemplation of Section 1343.[1] We conclude that the jury was so entitled.

I. BACKGROUND

Evans was president of Jagar Limited, which imported produce to the Bahamas for resale. Mark Mayrsohn was president of Produce Direct, Inc. ("PDI"), which was Jagar's primary supplier of produce. In 1995, PDI acquired credit insurance from the Export-Import Bank to address the risk of non-payment by Jagar. In mid-1996, in conjunction with its application to renew its policy, PDI requested a financial report from Jagar. Jagar produced to PDI a financial statement showing the company as profitable through the fiscal year ending June 30, 1996, even though an independent auditor's report prepared in February 1997 reflected that Jagar suffered a net loss of almost $1,000,000 during that fiscal year and described its survival as in "substantial doubt." The renewal policy was issued effective September 1, 1996, with a term expiring May 1, 1997. Under the terms of the policy, PDI was required to report to the insurer arrearages of over 120 days and to make reasonable collection efforts before filing a claim.

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[1] Section 1343 provides, in pertinent part, that "[w]hoever, having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire . . . communication in interstate or foreign commerce, any writings . . . for the purpose of executing such scheme or artifice," shall be punished as set forth therein.

Jagar regularly purchased $100,000 or more of produce a week and, until early 1997, it paid PDI's invoices within 30 days or a bit more. At that point, Jagar's payments became smaller, such that its outstanding balance swelled to over $1,100,000 by late April. On April 25, Jagar abruptly switched suppliers, but on May 2 and May 13 it made payments to PDI totaling approximately $70,000.

On May 20, Mayrsohn telefaxed Evans a letter announcing his imminent visit to the Bahamas and requesting a meeting to discuss the companies' present and future business relations. Mayrsohn then called Jagar's bookkeeper, Diane Fletcher, and scheduled a meeting with Evans for May 26. On May 22, Mayrsohn telefaxed to Fletcher the letter on which conviction was based,[2] the body of which reads as follows:

> Just a short note to confirm our meeting together with Mr. Evans on Monday at 2:30 p.m. at your offices. For your review I've enclosed some preliminary information, a report of the current receivables with the aging from the invoice date. As discussed, we must stay within 120 days for the Ex-Im Bank. Your account is right now at that limit and we should be receiving your payments now in order to keep up with the schedule. We hope that you are preparing something to send us for this week and can continue to stay within the 120 day Ex-Im requirement. We look forward to a positive and successful meeting together.

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[2] The indictment was not returned until May 21, 2002. Thus, all earlier communications (including transmission of the false financial statement) fell outside the statute of limitations and could not form the basis of prosecution. *See* 18 U.S.C. § 3282(a).

On May 23, Fletcher telefaxed a letter to Mayrsohn confirming the Monday meeting and listing invoices that needed to be reconciled between the parties. At the May 26 meeting in the Bahamas, Evans made clear that Jagar would not give PDI any new business or write a check on the spot, but he assured Mayrsohn that Jagar would promptly send another check and would pay off its debt. On May 30, Jagar sent PDI a check for $27,511.60, which paid in full the three oldest invoices. On June 16, Jagar sent PDI a check for $12,015.90, which paid in full the next oldest invoice. These were the last payments Jagar made, leaving an unpaid principal balance of almost $1,100,000.

The jury convicted Evans on three counts of wire fraud, involving the May 22 telefax as well as subsequent transmissions from Mayrsohn to Evans dated June 27 and July 3. The district court granted Evans' motion for judgment of acquittal with respect to the latter two letters but denied the motion with respect to the May 22 telefax.

II. STANDARD OF REVIEW

"We review de novo the denial of a motion for judgment of acquittal." *United States v. Hernandez,* 433 F.3d 1328, 1332 (11th Cir. 2005). "When the motion raises a challenge to the sufficiency of the evidence, we review the sufficiency of the evidence de novo, drawing all reasonable inferences in the government's favor." *Id.* (internal quotes omitted). "To affirm the denial . . . , we need determine only that a reasonable factfinder could conclude that the evidence established the defendant's guilt beyond a reasonable doubt." *United States v. Perez,* 443 F.3d 772, 774 (11th Cir. 2006).

III. DISCUSSION

A transmission is "for the purpose of executing" the scheme if it is "incident to an essential part of the scheme." *Pereira v. United States,* 347 U.S. 1, 8, 74 S.Ct. 358, 362-63, 98 L.Ed. 435 (1954). "Letters mailed after a scheme has reached fruition cannot have been 'for the purpose of executing' the scheme within the meaning of 18 U.S.C. § 1341." *United States v. Georgalis,* 631 F.2d 1199, 1204 (5th Cir. 1980).[3] This description of "fruition" as the critical juncture derives from *Kann v. United States,* 323 U.S. 88, 65 S.Ct. 148, 89 L.Ed. 88 (1944), in which the Court held that, because the scheme "had reached fruition" before the transmissions at issue, "[i]t cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires." *Id.* at 94, 65 S.Ct. at 151. Supreme Court and Eleventh Circuit cases have since repeatedly identified "fruition" of the scheme as the point beyond which mail and wire transmissions cannot be in furtherance of the scheme.[4] *E.g., Schmuck v. United States,* 489 U.S. 705, 711-12, 109 S.Ct. 1443, 1448, 103 L.Ed.2d 734 (1989); *United States v. Maze,* 414 U.S. 395, 402, 94 S.Ct. 645, 649, 38 L.Ed.2d 603 (1974); *United States v. Adkinson,* 158 F.3d 1147, 1163 (11th Cir. 1998) ("We have not hesitated to reverse mail fraud convictions

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[3] The mail fraud statute, like its wire fraud counterpart, applies to transmissions "for the purpose of executing such scheme or artifice." 18 U.S.C. § 1341. Because "[t]he 'scheme or artifice to defraud' and 'for the purpose of executing' language in the mail and wire fraud statutes are construed identically," *United States v. Hasson,* 333 F.3d 1264, 1271 n.7 (11th Cir. 2003), we borrow freely from cases construing Section 1341.

[4] This Court sometimes uses the phrase "in furtherance of the scheme" in lieu of the quoted statutory language. *E.g., Hasson,* 333 F.3d at 1270; *United States v. Italiano,* 837 F.2d 1480, 1482 (11th Cir. 1988). The two phrases carry the same meaning.

where the underlying scheme has reached fruition prior to the mailing.").

A scheme has "reached fruition" when it is "fully consummated." *Henderson v. United States,* 425 F.2d 134, 141 (5th Cir. 1970); *accord United States v. Kent,* 608 F.2d 542, 546 & n.6 (5th Cir. 1979); *see also Kann,* 323 U.S. at 94, 65 S.Ct. at 151 ("The scheme in each case had reached fruition [because] [t]he persons intended to receive the money had received it irrevocably" and "[i]t was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank.").

Evans describes the "true objective" of the scheme as getting PDI to continue supplying produce on credit. That objective, Evans continues, was fully accomplished by April 25, when Jagar stopped acquiring produce from PDI. Thus, he concludes, the scheme had reached fruition by that date, such that Mayrsohn's telefax of May 22 could not have been for the purpose of executing the scheme.[5]

To the extent Evans assumes that a scheme to defraud necessarily reaches "fruition" when the defendant receives the "fruit" of his fraud, he is mistaken. "[I]t is a well-established principle of mail fraud law that use of the

[5] Evans suggests in the alternative that the scheme reached fruition when the renewal policy was issued in September 1996, apparently on the theory that, with the policy in place, PDI could have no hesitation about supplying endless produce on credit. Evans' premise is facially implausible, since the policy covered only 90% of the first $600,000 in losses, while Jagar's debt reached $1.1 million. At any rate, the superseding indictment charged, and Evans concedes, that the purpose of the fraud included actually obtaining produce on credit, not simply increasing the probability of doing so. Thus, the scheme could not have reached fruition before April 25.

mails after the money is obtained may nevertheless be 'for the purpose of executing' the fraud." *United States v. Ashdown,* 509 F.2d 793, 799 (5th Cir. 1975). "If the scheme continues, mailings made after receipt of the money can clearly support conviction." *United States v. Knight,* 607 F.2d 1172, 1175 (5th Cir. 1979). "This is another way of saying that the scheme may embrace more than just fraudulent acquisition of money or documents." *United States v. Kent,* 608 F.2d 542, 546 (5th Cir. 1979). For example, a "two pronged" scheme may include both "writing checks on closed accounts to obtain goods and services without paying for them" and "working to retain those goods as long as possible by convincing merchants and banks that the . . . checks were actually legitimate." *United States v. Lee,* 427 F.3d 881, 888 (11th Cir. 2005).

More specifically, "[p]recedent is clear that letters designed to conceal a fraud, by lulling a victim into inaction, constitute a continuation of the original scheme to defraud." *Georgalis,* 631 F.2d at 1204. That is, when the scheme includes not only obtaining the benefit of the fraud but also delaying detection of the fraud by lulling the victim after the benefit has been obtained, the scheme is not fully consummated, and does not reach fruition, until the lulling portion of the scheme concludes. The Government concedes that Evans had received the full benefit of his fraud as of April 25. The issue is whether Mayrsohn's May 22 telefax falls within this lulling doctrine.

The doctrine traces its roots to *United States v. Sampson,* 371 U.S. 75, 83 S.Ct. 173, 9 L.Ed.2d 136 (1962):

> [T]he indictment in this case alleged that the defendants' scheme contemplated from the start the commission of fraudulent activities which were to be and actually were carried out both before

> and after the money was obtained from the victims [and] specifically alleged that [certain documents] were mailed by the defendants to the victims for the purpose of lulling them by assurances that the promised services would be performed. We cannot hold that such a deliberate and planned use of the United States mails by defendants engaged in a nationwide, fraudulent scheme in pursuance of a previously formulated plan could not . . . be found . . . to be 'for the purpose of executing' a scheme within the meaning of the mail fraud statute.

Id. at 80-81, 83 S.Ct. at 176. The mailings at issue in *Sampson,* which were sent by the defendants to multiple victims after the defendants "had obtained all the money they expected to get from that victim," *id.* at 79, 83 S.Ct. at 175, "were designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place." *Maze,* 414 U.S. at 403, 94 S.Ct. at 650. Such transmissions fall within the lulling doctrine. *E.g., United States v. Lane,* 474 U.S. 438, 452, 106 S.Ct. 725, 733, 88 L.Ed.2d 814 (1986); *United States v. Hewes,* 729 F.2d 1302, 1321 (11th Cir. 1984); *United States v. Toney* ("*Toney I*"), 598 F.2d 1349, 1353 (5th Cir. 1979). Evans offers a number of reasons why the lulling doctrine should not apply here, but none is convincing.

First, Evans argues that the superseding indictment did not charge that his scheme included lulling PDI into inaction after Jagar finished receiving produce on credit. This argument was not asserted in Evans' initial brief, and "[a]rguments raised for the first time in a reply brief are

not properly before a reviewing court." *Herring v. Secretary, Department of Corrections,* 397 F.3d 1338, 1342 (11th Cir. 2005) (internal quotes omitted). At any rate, the superseding indictment charged that, as part of the scheme or artifice to defraud, "[t]o lull PDI and the Ex-Im Bank and prevent them from detecting Jagar's true financial condition and the falsity of Jagar's submitted financial statements, on repeated occasions [Evans] falsely represented and caused to be falsely represented to PDI that Jagar was in good financial condition, and that Jagar had the financial ability to pay its escalating outstanding balance to PDI." Evans concedes that these allegations "essentially asserted that the May 22nd fax was a 'lulling' letter."

Second, Evans argues that the lulling doctrine applies only if the defendant continues to perpetrate similar frauds, as in a Ponzi scheme. This is a common scenario, because the lulling of earlier victims facilitates the defrauding of later victims,[6] but the doctrine applies equally

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[6] *See, e.g., United States v. Brewer,* 807 F.2d 895, 898 (11th Cir. 1987) (applying the lulling doctrine where the scheme "was designed so that the investors' early demands for repayment were delayed for a sufficient time to allow [the defendant] to repay them by using monies which were received as more and more victims later contributed"); *Georgalis,* 631 F.2d at 1204 (applying the lulling doctrine where the defendant continued to solicit further funds from investors); *United States v. Toney* ("*Toney II*"), 605 F.2d 200, 206-07 (5th Cir. 1979) (applying the lulling doctrine where, during the period the complaining victim was lulled, additional investors were acquired); *Toney I,* 598 F.2d at 1353 & n. 6 (applying the lulling doctrine where "[a]n integral part of the scheme was reassuring past purchasers in order that future purchasers could be persuaded to buy . . . distributorships," "thereby prolonging the life of the fraudulent scheme"); *see also Kann,* 323 U.S. at 94-95, 65 S.Ct. at 151 (recognizing that a mailing after the defendant has received the fruit of his fraud may be for the purpose of executing

(Continued on following page)

when, as here, there is but a single victim, as to whom the defendant has received the full benefit of the fraud before the lulling communication. *See Lane,* 474 U.S. at 441, 452-53, 106 S.Ct. at 727-28, 733-34 (applying the lulling doctrine to a scheme to defraud one insurer in connection with one insured loss); *see also Henderson,* 425 F.2d at 141 (identifying delay in detection in order to perpetrate additional frauds, and delay in detection by lulling the victim, as separate bases for finding a mailing to be in execution of the scheme). Nor can we divine any reason why a doctrine that applies to attempts to "postpone [victims'] ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely" should be triggered when the defendants' reason for desiring to avoid apprehension is to perpetrate future frauds but not when their motivation is to escape the legal consequences of their past frauds.[7]

Evans next argues that the lulling doctrine applies to a transmission from a victim only if the transmission was preceded by a lulling communication from the defendant.[8]

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the scheme "where the use of the mails is a means of concealment so that further frauds which are part of the scheme may be perpetrated").

[7] Evans suggests that his argument is supported by *Henderson,* which noted that "one common element in the 'lulling' cases is that the lulling devices comprised a fundamental part of the basic scheme and its desired continued perpetration." 425 F.2d at 143. The *Henderson* Court did not hold that the lulling doctrine applies only when the defendant sought "continued perpetration" of the fraud, and any dearth of cases applying the doctrine when the scheme involves a single victim of a completed fraud vanished with *Lane.*

[8] Evans does not, and could not successfully, assert that a communication from a victim can never fall within the lulling doctrine. *See Brewer,* 807 F.2d at 897-98 (applying the lulling doctrine to demand letters from victims); *Toney I,* 598 F.2d at 1353-54 (applying the lulling doctrine to letters from a victim's attorney).

This Court need not resolve whether the doctrine is so restricted, because there were communications attributable to Evans prior to May 22 that a properly functioning jury could have found to be lulling. First, the checks dated May 2 and May 13 made it appear as though Jagar would honor its obligation to pay off its debt. Second, Evans' agreement (through Fletcher) to meet with Mayrsohn made it appear as though Jagar was willing to negotiate a resolution of the parties' differences. *See Toney I,* 598 F.2d at 1354 ("So long as [the victim] thought there was a possibility that matters could be settled through direct negotiations with [the defendant], he was less likely to report the fraudulent scheme.").

Evans notes that he agreed to meet with Mayrsohn on short notice, which he argues is incompatible with a lulling purpose. The jury was authorized to find otherwise, especially since a refusal to meet might have fueled Mayrsohn's suspicions, while meeting with him allowed Evans the opportunity to more persuasively lull PDI into further delay. Moreover, the jury was entitled to view the agreement to meet, and the partial payments sent in early May, in light of Evans' conduct in the days after May 22, which the jury could easily find to be lulling: his May 23 telefax (through Fletcher) identifying particular invoices requiring reconciliation before they could be paid, and his promise at the May 26 meeting to pay off Jagar's debt, both of which falsely signaled that Jagar would uphold its obligations.

Evans also complains that Mayrsohn, by his May 20 telefax requesting a meeting, initiated the string of communications between them. Whatever the result would have been had Evans remained silent, he did not do so, and his situation is thus no different than that of the

defendants in *Toney I,* who did not initiate the correspondence but who (through their company) replied and who were found liable based on subsequent letters from the victim's attorney. 598 F.2d at 1352, 1354.

Evans next argues that the May 22 telefax lulled no one but instead advanced the discovery of his fraud. As to the former point, the success of the lulling effort is immaterial. *Hewes,* 729 F.2d at 1321 ("[T]he failure of the letters actually to lull all of Rekcus's creditors does not relieve the appellants of criminal liability [because] [s]uccess of the fraudulent scheme is not an element of a Section 1341 offense."); *Toney I,* 598 F.2d at 1354 n.8 ("Regardless of whether the content of the two letters [by the victim's attorney] had the effect of lulling anyone, . . . the jury could reasonably find that the participants in the fraudulent scheme intended that [the attorney's] writing and mailing of the count letters would at least delay further complaints.").

As to the latter, while a transmission from a victim may not be in furtherance of the scheme if its "only likely effect would be to further detection of the fraud," *United States v. LaFerriere,* 546 F.2d 182, 187 (5th Cir. 1977), that principle has been applied by this Court only when the victim recognizes the likelihood of fraud and threatens to sound the alarm if not swiftly satisfied.[9] Here, the May 22 telefax did not demand immediate satisfaction but simply reminded Evans that PDI would have to report arrearages

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[9] In *LaFerriere,* the victim " strongly suspected that he was a victim of fraud," and his attorney's letter "demand[ed]" satisfaction "within five days of receipt of this letter," failing which the victim would make an "immediate complaint" to the state insurance commission and also "press both civil and criminal action." 546 F.2d at 185 n. 3, 186.

over 120 days and expressed the "hope" that Jagar would send sufficient funds to stay inside that boundary. Nor did PDI's apparent intent to comply with its insurer's reporting requirement communicate a threat to involve the authorities in ferreting out a fraud, especially one which neither the telefax nor the evidence at trial indicates Mayrsohn then suspected. Evans' related suggestion that the telefax helped fulfill PDI's obligation to make reasonable collection efforts before seeking insurance benefits and thus "inch[ed] [PDI] closer to the date upon which it could make a claim," at best illustrates the unhelpful truism that, with each passing day, a fraud comes closer to exposure as the remaining potential delay in its discovery declines.

Finally, Evans argues that, in order to support conviction, his scheme as originally hatched in 1996 must have included receiving communications such as the May 22 telefax. For this he relies on *Sampson,* in which the Court noted that the "scheme contemplated from the start" the use of lulling communications to persuade investors that the promised services would be performed. 371 U.S. at 80, 83 S.Ct. at 176. Assuming without deciding that the intention to lull must be part of the scheme from its inception, the intention to lull in any particular manner need not be. On the contrary, "[a]s the execution of the scheme . . . proceeds, new ways may be adopted or invented to effectuate the original design," since "[m]ere details may be changed and the scheme remain the same." *Weiss v. United States,* 122 F.2d 675, 680 (5th Cir. 1941). Evans does not challenge the superseding indictment's allegation that the scheme originally included lulling by means of affirmative misrepresentations of

Jagar's financial health. It is thus irrelevant whether the scheme also originally included lulling by other means.

Undeterred, Evans maintains that his scheme never included receiving communications from the victim. The jury, however, was entitled to find otherwise. As discussed above, by sending two teasing checks and agreeing to meet and discuss the parties' business relations, Evans appeared to engage in lulling activity, especially when viewed through the prism of his post-May 22 behavior. The very purpose of lulling activity is to keep the victim dealing with the defendant rather than with the authorities, and the agreement to meet on May 26 was a clear indication that PDI should continue to deal with Evans. Mayrsohn's May 22 telefax confirming the meeting and preparing for it did precisely that and was thus part and parcel of the scheme to delay detection of the fraud by lulling PDI into believing that the parties' difficulties would be worked out. To borrow from *Toney I,* "[i]f, as the jury could find, [Evans'] motive in inviting [PDI] to continue the correspondence was to lull [PDI] into deferring any complaint to the authorities, then [Mayrsohn's] responses were an integral part of [Evans'] fraudulent scheme." 598 F.2d at 1354. The May 22 telefax was, in short, "incident to an essential [lulling] part of the scheme." *Pereira,* 347 U.S. at 8, 74 S.Ct. at 362-63.

IV. CONCLUSION

The jury's determination that Evans caused the May 22 telefax to be sent "for the purpose of executing" his scheme is consistent with governing law and is supported

by sufficient evidence. The trial court thus properly denied Evans' motion for judgment of acquittal.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 02-20451-CR-JORDAN

UNITED STATES OF AMERICA)
)
vs.)
)
HUBERT GARLAND EVANS)

ORDER ON MOTION FOR JUDGMENT OF ACQUITTAL

(Filed [Illegible])

At trial, I reserved ruling on Garland Evans' Rule 29 motion for judgment of acquittal. When the jury found Mr. Evans guilty of the three wire fraud charges in the superseding indictment, I asked the parties to file memoranda on whether there was sufficient evidence to support the verdict.

As evidenced by the amount of time I have been considering the matter, the sufficiency of the evidence presents a close question. For the reasons which follow, I conclude that Mr. Evans' Rule 29 motion should be denied as to Count 1 but granted as to Counts 2 and 3.

I. THE STANDARD

The elements of wire fraud under 18 U.S.C. § 1343 are (1) the intentional participation in a scheme to defraud, and (2) the use of interstate wires "for the purpose" of executing the scheme. A person need not use the wires himself to violate § 1343. Instead, it is enough if the person causes the use of the wires by someone else. Such use, moreover, need not have been specifically intended; it

only has to be reasonably foreseeable. *See generally United States v. Hasson*, 333 F.3d 1264, 1270 (11th Cir. 2003).

The Rule 29 standard is a familiar one. I must decide whether, "based on the evidence presented in the light most favorable to the government, a reasonable jury could have found [Mr. Evans] guilty beyond a reasonable doubt." *United States v. Ellington*, 348 F.2d 984, 989 (11th Cir. 2003). The government amply proved Mr. Evans' intentional participation in a scheme to defraud, so the first element is not an issue. The difficult question presented by this case concerns the second element: whether the use of interstate wires – here facsimile transmissions from the president of the victim to Mr. Evans after the shipments of produce to Mr. Evans' company had stopped – were in furtherance of the scheme to defraud.

II. THE FACTS[1]

The facts below are taken from the government's post-trial memorandum (save for some stylistic edits), with a caveat. The material in bold face comes from evidence presented by the government in its case-in-chief, but omitted by the government from the factual recitation in its memorandum.

Mr. Evans was the president and a director of the board of Jagar, a company in the Bahamas. Del Valle Tr. at 12; Mayrsohn Tr. at 5; Eddy Tr. at 6; GX 11. Jagar imported fresh fruits and vegetables, and then sold them

[1] The portions of the trial transcript ordered so far are not sequentially numbered, so the testimony is cited by the name of the witness or the date of the proceeding followed by the page of the particular passage.

in the Bahamas. Del Valle Tr. at 12; Mayrsohn Tr. at 5; GX 13. Mr. Evans was in charge of Jagar and responsible for its daily operations. Del Valle Tr. at 12; Mayrsohn Tr. at 5; Eddy Tr. at 6. Mr. Evans also approved and signed the financial statements for Jagar. GX 11, 14, 20.

From 1994 to 1997, PDI, an import-export company with offices in New York and in Hialeah, Florida, sold approximately $4 million to $6 million of fresh fruits and vegetables a year to Jagar. Mayrsohn Tr. at 3-4, 10. As Jagar became PDI's biggest customer, PDI decided to get an export credit insurance policy from the Ex-Im Bank to protect PDI from any large loss resulting from non-payment by Jagar. **PDI obtained its first such policy from the Ex-Im Bank in 1995.** Del Valle Tr. at 14-15, 17-19; Mayrsohn Tr. at 10-11, 13-14; Dettner Tr. at 101-02; GX 12-14.

In mid 1996, the Ex-Im Bank requested Jagar's financial statements in support of PDI's application for the renewal of the credit insurance policy. Dettner Tr. at 105-06; Del Valle Tr. at 16-17; Mayrsohn Tr. at 12, 14. The Ex-Im Bank relied upon Jagar's internally generated balance sheets as of June 30, 1996, and statements of income and retained earnings for the year ended June 30, 1996, to approve the renewal. Dettner Tr. at 117-20, 127, 135, 189-90; GX 13, 17. The internally generated financial statements showed Jagar's business to be solvent, with a net income of $116,000. Dettner Tr. at 134; Del Valle Tr. at 41; Eddy Tr. at 22-23; GX 2, 13, 17, 20.

In February of 1997, the accounting firm of Deloitte & Touche in Nassau, Bahamas, conducted a review of Jagar's business as of June 30, 1996 (the same fiscal period as Jagar's internally generated financial statements). Eddy

Tr. at 24; GX 11 at 1 (page 1 of the Deloitte & Touche review report). The review report, however, showed that Jagar had a net loss of $987,596. Eddy Tr. at 24-25; GX 11 at 3 (page 3 of the review report). Deloitte & Touche also expressed an opinion that there was "substantial doubt" that Jagar would be able to continue as a "going concern," meaning that "the company may go out of business." Dettner Tr. at 145; GX 11 at 1 (page 1 of the review report). Mr. Evans did not disclose to the Ex-Im Bank or PDI (1) the existence of the Deloitte & Touche review report or (2) Jagar's true financial condition. Dettner Tr. at 133, 192-93; Del Valle Tr. at 51; Mayrsohn Tr. at 12-13, 34, 42, 44, 51-52.

The policy issued by the Ex-Im Bank became effective on September 1, 1996, and expired on May 1, 1997. Not only did the policy list September 1, 1996, as the effective date, various government witnesses confirmed this date during the government's case-in-chief. GX 12 at 1 ("Coverage Effective Date: September 1, 1996"); GX 18 at 1 (confirmation of coverage with effective date of September 1, 1996); GX 21 at 3 (PDI claim listing effective date of policy as September 1, 1996); Mayrsohn Tr. at 59 ("Coverage effective date, September 1, 1996."); Del Valle Tr. at 108 ("Q: The policy became effective September 1, 1996?" "A: Yes."); Dettner Tr. at 112 ("They [PDI] were agreeable to the September 1 effective date.").[2] The policy insured 90% of Jagar's

[2] In the middle of trial, the government sought to introduce an endorsement to the policy changing the effective date to October 1, 1996. I did not allow the government to introduce the endorsement because it had not been turned over in discovery and because Mr. Evans had built

(Continued on following page)

unpaid balance up to the sum of $600,000 with a claim payment limit of $540,000 (90% of $600,000). GX 12 at 1 ("Insured Percentage" of 90% and "Claim Payment Limit" of $540,000). Significantly, however, the policy also [sic] **a volume limit; it only applied to the first $2 million of merchandise invoiced by PDI to Jagar following the policy's effective date.** *Id.* **at 1 ("Shipment Volume Limit" of $2,000,000). As the government's own witnesses explained, PDI was without coverage once it invoked $2 million of merchandise to Jagar because there was no insurance for any unpaid balance after the volume limit had been exceeded. Dettner Tr. at 178 ("They [PDI] were purchasing coverage on $2,000,000 of sales. So if they reached two million . . . no further sales are covered or insured. The policy period might have been eight months and they may have shipped two million in four months. That is it. That is all the coverage they have."). *See also* Mayrsohn Tr. at 47-48; Del Valle Tr. at 107; Dettner Tr. at 158, 180.**

Beginning in early 1997, Jagar, though "still purchasing regularly and paying regularly," started paying a "little less than what they would purchase on a weekly basis." **For example, as of January 20, 1997, the outstanding balance due from Jagar to PDI was $18,546.20. GX 4, Open Invoice Report at 1; Del Valle Tr. at 54. At the end of January of 1997, the outstanding balance had increased to $146,382.86. The figure tripled to $453,089.36 by the end of February, and ballooned to $828,012.88 by the end of March. GX 4, Open Invoice**

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part of his defense on the effective date being September 1, 1996. *See United States v. Camaro-Vergara*, 57 F.3d 993, 998-99 (11th Cir. 1995).

Report at 1-3. By April of 1997, Jagar began to fall further behind in making payments to PDI on the outstanding invoices. **Although it was still "making regular payments which were substantial payments," the outstanding balance continued to grow. GX 4, Open Invoice Report at 3; Del Valle Tr. at 43-44; Mayrsohn Tr. at 17-18.** Nonetheless, Jagar and Mr. Evans led PDI to believe that Jagar was in good financial shape based upon the 1996 financial statements, and thus Jagar was allowed to continue to purchase large containers of fresh fruits and vegetables from PDI on an approximately 30-day credit basis. Mayrsohn Tr. at 16-17; Del Valle Tr. at 18, 41, 50.

On April 25, 1997, a PDI salesman responsible for the Jagar account, Mitch Byalick, left PDI with others to establish a new, separate company. Mayrsohn Tr. at 18-19. Mr. Byalick took Jagar's business to the new company. *Id.* at 20. **By this time, Jagar's outstanding balance with PDI was $1.131 million. Del Valle Tr. at 550.** Jagar sent a check for more than $40,000 to PDI for its outstanding balance on April 29, 1997. *Id.* at 24-25; GX 3.

Starting in May of 1997, PDI, through its president, Mark Mayrsohn, attempted to persuade Mr. Evans to return Jagar's business to PDI. Mayrsohn Tr. at 21-23. At that time, Mr. Mayrsohn also made efforts to collect the outstanding balance from Mr. Evans. *Id.* at 24.

On May 20, 1997, Mr. Mayrsohn sent a letter to Mr. Evans by facsimile to request a meeting in the Bahamas to discuss their "business together and its future direction." Mayrsohn Tr. at 26; GX 25. Mr. Mayrsohn explained at trial why he sent the letter:

> Up until that time, between April 25th and May 20th, in those weeks we had received three checks, the $40,000 check you had seen and another one after that, about $30,000.
>
> So we had received about 70 thousand. I thought this was again slower that [sic] I would have wanted but my name [sic] was coming back. I was very hopeful that Mr. Evans would see to it to pay us the balance.
>
> He and I always had a cordial if not friendly relationship in the past and I thought I could explain to him that we should continue that as we have done business in a prior time before it stopped. I viewed this as a similar situation.
>
> If I may add, when we stopped business in the prior time [in the early 1990s] it was very similar to this. The volume was less.

Mayrsohn Tr. at 27. In response, Diane Fletcher of Jagar set up a meeting between Mr. Mayrsohn and Mr. Evans. *Id.* at 28-29.

On May 22, 1997, Mr. Mayrsohn sent another letter by facsimile from his office in Hialeah, Florida, to Jagar's offices in the Bahamas. This was the wire transmission charged in Count 1 of the indictment. **In this letter, Mr. Mayrsohn confirmed his meeting with Mr. Evans the following Monday, and said that PDI needed some payments from Jagar to stay within the 120-day invoice limit set by the Ex-Im Bank.** Mayrsohn Tr. at 28-29; GX 4 (Count 1 wire communication). As Mr. Mayrsohn explained at trial:

> A. This [is] another letter from, or fax from myself to the Jagar company. This was May 22, two days later, to Diane. That would be Diane Fletcher

> who we often talked to at Jagar's company and especially when we were not able to talk to Mr. Evans. This is confirming the meeting that I talked about in the letter to two days earlier.
>
> Q. [Government]. That we just talked about?
>
> A. Yes. I had called her and she said, yes, a meeting could happen. It was agreed that Monday at 2:30 at Mr. Evans' new offices.

Mayrsohn Tr. at 28-29.

On May 23, 1997, Ms. Fletcher of Jagar sent a note by facsimile to Mr. Mayrsohn. This letter confirmed the scheduled meeting with Mr. Evans and Mr. Mayrsohn, and listed invoices to be reconciled between them. Mayrsohn Tr. at 30; GX 26. Mr. Mayrsohn viewed this note as a "very positive sign by the Jagar company." Mayrsohn Tr. at 30.

As scheduled, on May 26, 1997, Mr. Evans and Ms. Fletcher met Mr. Mayrsohn in Mr. Evans' offices in the Bahamas. *Id.* at 33. Mr. Mayrsohn described the meeting as follows:

> A. We talked about the business, a little bit about what happened, where we were at the time and Mr. Evans made it clear to me that he would not be placing orders with us. I said, okay. I understand that. I am sorry to hear that. I also would like to talk about the money, which was, as you well know now, a very pressing need for us, but I needed that as professionally as I could, make sure that I got the money. I needed the money.
>
> Q.[Government]. What did he say about the money?

A. Well, I specifically asked for a check right there at the meeting. I was not given a check, but I was reassured that I would get a check and that I would be paid and I left with the impression that, okay, this is the same Garland Evans I have always knows [sic]. I will be patient and I will receive $1.1 million and my company will be saved. So that was the gist of it.

Q. At that meeting, can you can you tell us whether or not Mr. Evans said that his financial – his company was in the red? Do you know what that means, in the red?

A. Yes. In the red means I don't have money. You are out of money. You owe money. Mr. Evans never said that.

Q. At that meeting?

A. At that meeting.

Q. What about previously?

A. No. Never said that previously.

Q. Were there any signs when you visited his offices that he was running out of money?

A. On the contrary. I thought that he had a swankier, much smarter, much newer operation, much better able to handle the business we were doing. I was impressed. And it was that impression that he had the means to pay us back the money eventually.

Mayrsohn Tr. at 33-35. *See also id.* at 92-93, 95.

On May 28, 1997, Mr. Mayrsohn sent another letter to Mr. Evans. Mayrsohn Tr. at 35; GX 27. In this letter, Mr. Mayrsohn reviewed the May 26 meeting that "concluded

on a positive note," and informed Mr. Evans of the Ex-Im Bank 120-day requirement because "[Jagar's] account had just reached on that day 122 days old." Mayrsohn Tr. at 36; GX 27.

On May 28, 1997, PDI also sent out its first "Report of Overdue Accounts under Short-term Policies" to the Ex-Im Bank. GX 10. PDI reported that Jagar had an outstanding balance of approximately $146,382.86 which was 91-120 days old. *See* Del Valle Tr. at 68-71. The overdue reason was identified as "cash flow/commercial problems," but there was no further explanation. *Id.*

On May 30, 1997, Jagar sent another check for $27,511.60 to PDI. Mayrsohn Tr. at 37-38; GX 5.

> They were paying part of the unpaid balance. They paid a couple of invoices. So I was very happy, not as happy as I could have been but, hey, it was $27,000. I was looking for 100, but we were working it down and it was an immediate response to my appeal. I felt good about that too. I felt that would be reinforced with his payment.

Mayrsohn Tr. at 38.

On June 16, 1997, Jagar sent another check for $12,015.90 to PDI for the outstanding balance. Mayrsohn Tr. at 38-39; GX 5. **This was the last payment made by Jagar, and the fourth since Mr. Byalick took Jagar's account.** Mayrsohn Tr. at 38.

On June 27, 1997, Mr. Mayrsohn sent another letter by facsimile to Mr. Evans and Ms. Fletcher requesting payment on the outstanding balance. This was the wire transmission charged in Count 2 of the indictment. Mayrsohn

Tr. at 38-39; GX 7 (Count 2 wire communication). Through this letter, Mr. Mayrsohn "wanted to continue the communications. It was getting difficult. It was getting harder, but I wanted to try to continue. . . ." Mayrsohn Tr. at 39. Mr. Mayrsohn testified that he had not lost his hope that the business might continue with Jagar. *Id.* 39-40. Finally, while the letter was copied to the Ex-Im Bank, Mr. Mayrsohn explained that he had no plan to proceed with any type of action or file a notice of claim with the Ex-Im Bank. *Id.* at 41-42.

On July 3, 1997, Mr. Mayrsohn sent another note by facsimile to Jagar requesting payment. This was the wire transmission charged in Count 3 of the indictment. *Id.* at 43; GX 8 (Count 3 wire communication). He testified that he was disappointed with "no positive information from the Jagar company," but was hopeful that the letter would prompt a response by Mr. Evans. *Id.* at 43-44. Mr. Evans did not respond to this letter. *Id.* at 44.

On February 10, 1998, Mr. Mayrsohn attended a post judgment proceeding against Jagar in the Bahamas. Mayrsohn Tr. at 45-46, 49. At that hearing, PDI, through Mr. Mayrsohn, first learned of the existence of the Deloitte & Touche review report. Mayrsohn Tr. at 52. The Ex-Im Bank did not learn of the Deloitte & Touche review report until March of 1998. Mayrsohn Tr. at 52; Dettner Tr. at 136. At this post-judgment proceeding hearing, Mr. Evans stated, for the first time, that "he was bankrupt." *Id.* at 50.

As part of the investigation in this matter, Special Agent Anne Eddy interviewed Mr. Evans in January of 2001. Agent Eddy testified about the interview at trial:

> Q. [Government] Did you ask Mr. Evans the differences that you just noted to the jury and how

the two statements [Jagar's internally generated financial statements and Deloitte & Touche review report] would compare?

A. Yes, I did.

Q. Okay. Could you tell us the discussion you had about him – about[,] regarding the subject?

A. Uhm, let's see. Well, looking at the internally generated financial statements for the period ending 1996, I asked him if it would have been deceiving to present these financials to the Ex-Im bank in support of a credit application.

Q. What did he say?

A. He said yes.

Q. That it would be deceiving?

A. Yes.

Eddy Tr. at 4, 25-26.

In September of 1997, PDI filed its claim regarding the unpaid Jagar balance with the Ex-Im Bank. PDI, through Mr. Mayrsohn, certified under penalty of perjury that the unpaid balance was $1.075 million, but declared (incorrectly) that the first shipment to Jagar was made on January 21, 1997. GX 21 at 1, 3, 7. As PDI's own records showed, the shipments to Jagar began in September of 1996, and the $2 million volume limit in the policy was reached on January 22, 1997. Del Valle Tr. at 112-115; Mayrsohn Tr. at 60-61; GX 9 at Bates Nos. US034-US038 (running invoice totals). In other words, PDI had no coverage under the Ex-Im policy for produce invoiced after January 22, 1997.

III. ANALYSIS

PDI's last shipment of produce to Jagar was on April 25, 1997, when Mr. Byalick left PDI to start his own company and took Jagar's account with him. At this time, Jagar owed PDI about $1.131 million. GX 4, Open Invoice Report at 3; GX 9 at Bates No. US041.

The three substantive wire fraud charges in the superseding indictment were based on the facsimile transmissions from Mr. Mayrsohn of PDI to Mr. Evans on May 22, 1997 (Count 1), June 27, 1997 (Count 2), and July 3, 1997 (Count 3).[3] The question is whether these transmissions, which were subsequent to the last shipment of produce from PDI, were "part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the [transmission] later, through hindsight, may prove to have been counterproductive and return to haunt the perpetrator of the fraud." *Schmuck v. United States,* 489 U.S. 705, 715 (1989).[4] The Eleventh Circuit has rejected a bright-line rule that "any letter mailed from a victim to the defrauders cannot possibly have a lulling effect on that victim," *United States v. Toney,* 598 F.2d 1349, 1354 (5th Cir. 1979) (*Toney I*), so the

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[3] The initial indictment was returned on May 21, 2002, so the only wire transmissions the government could use were those taking place within the five-year statute of limitations period preceding the return of the indictment. *See* 18 U.S.C. § 3282(a). This meant, for example, that the government could not charge Mr. Evans' transmissions in 1996 associated with the false Jagar financial statements as substantive wire fraud violations.

[4] A fair number of the cases cited in this order are mail fraud cases under 18 U.S.C. § 1341, but they are equally applicable because the mail fraud and wire fraud statutes are interpreted in the same way. *See, e.g., Carpenter v. United States,* 484 U.S. 19, 25 n.6 (1987); *United States v. Conner,* 752 F.2d 566, 574 (11th Cir. 1985).

fact that the transmissions were sent by Mr. Mayrsohn – and not by Mr. Evans – is not problematic. As explained below, however, the cases discussing "lulling" communications, particularly those sent by victims, are not easy to harmonize.

A. Supreme Court Decisions

Starting with the Supreme Court cases, some decisions say the scheme ends when the perpetrator has accomplished the fraudulent objective, and that mailings or transmissions after that date of completion are not in furtherance of the scheme. *See, e.g., Kann v. United States,* 323 U.S. 88, 94 (1944) (scheme of defendants, which was to divert profits of their own corporation to a dummy corporation by obtaining fraudulently issued checks payable to them, ended when defendants cashed the checks, and subsequent mailing of checks for collection to drawee bank was not for the purpose of executing the scheme); *Parr v. United States,* 363 U.S. 370, 391-92 (1960) (later mailing of invoices by gasoline company not sufficiently connected to execution of defendants' scheme to obtain gasoline and other products and services through unauthorized use of school district gasoline credit card); *United States v. Maze,* 414 U.S. 395, 402 (1974) (where defendant's scheme was to use stolen credit card to obtain goods and services at certain hotels, the mailing of sales slips to actual credit card holder was not in furtherance of, or for purpose of executing, scheme – even though government alleged that delay in mailing would allow defendant to continue purchasing goods – because scheme reached fruition when defendant checked out of hotels). On the other hand, there are cases which conclude that subsequent mailings or

transmissions can be in furtherance of the scheme to defraud if meant to "lull" the victims into a false sense of security. *See, e.g., United Stares v. Sampson,* 371 U.S. 75, (1962) (in scheme to defraud businessmen by obtaining advance fees on the promise that defendants would help them obtain loans or sell their businesses, mailing of accepted applications, together with form letter assuring victims that the services they contracted would be performed, did not preclude application of mail fraud statute because there was a deliberate and planned use of the mails after the victims' money had been obtained). *Cf. United States v. Pereira,* 347 U.S. 1, 5 (1954) (where scheme of defendant was to defraud his wealthy wife into advancing him money for a hotel venture, mailing of check from wife's bank to wife, so she could give it to defendant, was in furtherance of scheme).

These cases, as summarized in *United States v. Lane,* 474 U.S. 438, 451 (1986), stand for the proposition that "[m]ailings occurring after the receipt of the goods obtained by fraud are within the statute if they 'were designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place.'" But stating this principle is easier than applying it. For example, the Supreme Court divided 5-4 on its application in *Schmuck,* a prosecution of a used-car distributor for mail fraud arising out of the rolling back of automobile odometers. The majority concluded that the mailing of title-application forms to the state by retail dealers who had purchased cars from the distributor and then sold them to consumers was part of the execution of the "ongoing" fraudulent scheme, 489 U.S. at 712 ("Schmuck's scheme

would have come to an abrupt halt if the dealers had either lost faith in Schmuck or had not been able to resell the cars obtained from him"), while the dissent thought that the case was controlled by prior decisions like *Kann* and *Maze, id.* at 722-24 (Scalia, J., dissenting) (the "law does not establish a general federal remedy against fraudulent conduct, with use of the mails as the jurisdictional hook, but reaches only 'those limited circumstances in which the use of the mails *is a part of the execution of the fraud.*") (emphasis added in dissent). As one commentator has noted, the *Kahn* [sic] *-Schmuck* line of cases – with its alternating broad and narrow views of the mailing element – "fail[s] to provide any real guidance" as to the relationship of the mailing to the fraudulent scheme. *See* P. Henning, *Maybe It Should Just be Called Fraud: The Changing Nature of the Mail Fraud Statute,* 36 Boston College L.Rev. 435, 459 (1995) ("If *Schmuck* is the final word, then the mailing element is little more than a nuisance that the government may prove almost as an afterthought in its case.").

B. Eleventh Circuit Decisions

As in the Supreme Court, the cases in the Eleventh Circuit are not easy to reconcile. A detailed discussion of the cases is therefore in order.

Starting with the oldest case first, *United States v. LaFerriere,* 546 F.2d 182 (5th Cir. 1977), involved a scheme to defraud arising out of worthless mortgage commitments in which borrowers paid one point of the amount to be borrowed in advance, and in which funds in escrow were distributed to certain defendants before the issuance of satisfactory commitments. LaFerriere was convicted on a

single count of mail fraud in which the mailing was a letter sent by the attorney for a borrower who had deposited money to obtain long-term mortgage financing. The former Fifth Circuit, relying on Supreme Court cases like *Maze,* held that this letter was not in furtherance of the scheme to defraud, and that it was not a "lulling" letter because its "only likely effect . . . would be to further detection of the fraud or to deter its continuation." *Id.* at 185-87.

United States v. Toney, 598 F.2d 1349 (5th Cir. 1979) *(Toney I),* decided two years after *LaFerriere,* explained that letters sent by victims could be in execution of the fraudulent scheme, and held that letters sent by the attorney for a victim in a fraudulent distributorship scheme were for the purpose of executing the scheme. The letters were classic "lulling" communications, as "there [was] much evidence that an integral part of the . . . scheme was that complaints from distributors were handled in such a way as to give the erroneous impression that Trans-World would take action to rectify any difficulties." *Id.* at 1353. *See also United States v. Toney,* 605 F.2d 200, 206-07 (5th Cir. 1979) (*Toney II*) (letters sent by defendant (or caused to be sent by defendant) in fraudulent distributorship scheme to attorney for victim was in furtherance of scheme where it delayed further complaints, lulled the victim into inaction for several months, and allowed defendant to sell more distributorships: "Therefore, it was of no consequence that the letter were [sic] mailed after Tradewinds received the money for Hyra's client.").

The next case is *United States v. Georgalis,* 631 F.2d 1199 (5th Cir. Unit B 1980); in which the defendant got people to invest in his company, whose product was a

smokeless, odorless fuel for decorative lighting. Contrary to representations in the materials used to solicit investments, the fuel did not burn in all the colors of the rainbow, was toxic when burned in green, and no program for developing, marketing, and distributing the product was ever developed. Moreover, of the half million dollars invested, the defendant diverted approximately 60% to other business enterprises in which he was involved. The former Fifth Circuit summarized the applicable standard as follows: "[L]etters designed to conceal a fraud, by lulling the victim into inaction, constitute a continuation of the original scheme to defraud. Letters mailed after a scheme has reached fruition cannot have been 'for the purpose of executing' the scheme within the meaning of 18 U.S.C. § 1341." *Id.* at 1204. As to five letters which were "designed either to allay suspicions, or to solicit further funds," the panel found no sufficiency problem. But as to two other letters sent by victims, one "recounting promises, so far unkept, made by [the defendant]," and the other "threatening to take legal action," the panel found the evidence insufficient because the letters were not "in furtherance of the scheme to defraud." *Id.* at 1205.

Following, *Georgalis* is *United States v. Brewer*, 807 F.2d 895 (11th Cir. 1987), a case involving a fraudulent Ponzi scheme with a non-existent gold fund. At issue were [sic] a letter sent by the defendant to a victim promising to pay money the victim had "loaned" with interest, and four demand letters sent by victims to the defendant. Declining to read *Georgalis* broadly, and stating that the holding in that case was "dependent upon the facts," the Eleventh Circuit affirmed the convictions. A reasonable jury, it explained, could have found that "the letters were mailed in furtherance of the scheme which was designed so that

the investors' early demands for repayment were delayed for a sufficient time to allow [the defendant] to repay them by using monies which were received as more and more victims later contributed to the bogus gold fund." *Id.* at 898.[5]

C. The Evidence in this Case

In relevant part, 18 U.S.C. § 1343 requires that the wire transmission in question be "for the purpose of executing [the] scheme or artifice" to defraud. Whether or not Mr. Mayrsohn's facsimile transmissions to Mr. Evans were "for the purpose" of executing the scheme requires determining whether the use of the wires was "sufficiently closely related to [Mr. Evans'] scheme to bring his conduct within the statute." *Maze,* 414 U.S. at 399.

If I were writing on a clean slate, I would agree with Justice Scalia's reading of the mailing element in § 1341 in

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[5] There are numerous decisions from other circuits applying (and trying to harmonize) the *Kann-Schmuck* line of cases. Although they are not binding, these decisions are instructive, and I have reviewed them for guidance. Needless to say, they are all very fact-specific. *Compare, e.g., United States v. Armstrong,* 2004 WL 1098839, *1-*5 (5th Cir. May 18, 2004) (in fraudulent scheme of "punching titles" and obtaining possession of cars with drafts that were not intended to be honored, mailing of fraudulent applications for title by local office of department of transportation were not in furtherance of scheme because each fraudulent act was complete when defendant obtained title copies from local office, the mailings did not assist defendant in covering up the fraud, and there was no evidence that mailings were reasonably foreseen), *with, e.g., United States v. Bach,* 172 F.3d 520, 521-22 (7th Cir. 1999) (where fraudulent oil and gas lease scheme was "both to defraud and to retain investors' money," check sent by defendant to victim as a purported portion of revenues, as well as report sent to another victim, were in furtherance of scheme).

Schmuck, would apply that analysis to the wire transmission element in § 1343, and would grant a judgment of acquittal in favor of Mr. Evans on all charges. But whatever else may be said about the slate, it is not clean, and my job is to apply the relevant Supreme Court and Eleventh Circuit cases as best as possible.

Because the cases discussed earlier are so fact-specific – indeed, many of the cases interpret prior decisions as being fact-dependent – whether a mailing or transmission from a victim is in furtherance of a scheme to defraud depends largely on how the scheme is defined, or confined, as well as when it is deemed to have reached fruition. *See Bach,* 172 F.3d at 521 ("The critical question is what the scheme was."). The scheme here, as alleged in the superseding indictment, was to obtain "money and property, that is, approximately $1,075,774.64, from the Ex-Im Bank and PDI, by means of material false and fraudulent pretenses, representations, and promises" concerning Jagar's financial condition, and "in an effort to prevent the detection of Jagar's financial distress the falsity of Jagar's submitted financial statements," Mr. Evans represented falsely to PDI that "Jagar would make payments on its escalating outstanding balance owed to PDI." Superseding Indictment at ¶¶ 14-19. As the government put it at the Rule 29 hearing, the object of the scheme to defraud was to "initially use the . . . false financial statements to obtain the . . . [Ex-Im Bank] renewal policy" and "then continue] to lie." Tr. of Jan. 27, 2003, at 40, 45.[6] According to the

[6] I do not put much stock in the government's characterization of one of the objectives of the scheme as "continuing to lie." Such an open-ended characterization could extend the statute of limitations indefinitely, a problem noted by Judge Posner in *Bach,* 172 F.3d at 522.

government, there were two victims of the scheme to defraud – the Ex-Im Bank and PDI – but these transmissions were not directed at the Ex-Im Bank, and the policy coverage had expired at the time of the transmissions, so I focus on PDI and Mr. Mayrsohn. Because the government concedes that the scheme to defraud was complete once PDI stopped shipments to Jagar, the critical issue is whether the transmissions sent by Mr. Mayrsohn, in light of what was going on, extended the scheme under the "lulling" rationale. *Id.* at 52.

As to Count 1, I conclude that the evidence was sufficient for the jury to return a guilty verdict. A reasonable argument can be made under *Kann*, *Parr*, *Maze*, *LaFerriere*, and *Georgalis* that the scheme ended in late April of 1997, when PDI stopped shipping produce to Jagar and when Mr. Byalick took Jagar's account with him to his new company, and that Mr. Mayrsohn's subsequent facsimile transmissions to Mr. Evans were not in furtherance of the scheme. But the following facts persuade me that under *Sampson*, *Toney I*, *Toney II*, and *Brewer*, the government proved enough to sustain a conviction on Count 1. First, Jagar and Mr. Evans had a prior business relationship with PDI and Mr. Mayrsohn, and in the early 1990s, when Jagar switched suppliers, it paid PDI its outstanding balance, which was "several hundred thousand" dollars. Mayrsohn Tr. at 27. The 1997 dealings cannot be viewed without considering the prior course of conduct, which gave Mr. Mayrsohn hope that the outstanding balance would again be paid down (or at least be paid down substantially) by PDI. Second, when Mr. Mayrsohn sent the May 22, 1997, transmission which is charged in Count 1, Ms. Fletcher of PDI had already agreed to set up a meeting between Mr. Evans and Mr.

Mayrsohn in the Bahamas, and the jury could find that the meeting was arranged (at least in part) so that Mr. Mayrsohn would delay any legal action against Jagar. Had Jagar or Mr. Evans not responded to Mr. Mayrsohn's earlier transmission (of May 20, 1997), then maybe Count 1 could not survive. But that is not what happened. Third, Jagar was continuing to make payments at the time of the May 22, 1997, transmission, and made some payments thereafter. From April 29, 1997, to June 16, 1997, Jagar paid PDI a little more than $100,000, so it was not at all clear that PDI or Mr. Mayrsohn had lost hope of additional payments. Fourth, the transmission – on its face – is not a unilateral demand or collection letter. Fifth, at the meeting on May 26, 1997, Mr. Evans told Mr. Mayrsohn he would send another check. In sum, these facts, viewed in the light most favorable to the government, support the jury verdict on Count 1. Looking at the context in which the May 22, 1997, transmission was sent, as explained in *Toney II,* the fact that Jagar and Mr. Evans had received all the produce from PDI at the time of the transmission does not preclude a conviction. *See also Porcaro v. United States,* 789 F.2d 73, 73-74 (1st Cir. 1986) (letter sent by customer of fraudulent distributorship scheme to defendant, to set back in motion buy-back provision of distributorship contract, was in furtherance of scheme because (1) defendant may have felt obligated to honor the provision depending on how vigorously customer pressed his rights, and that would have affected defendant's revenues; (2) defendant's continuing advertisements coupled with conversation between defendant and customer following the sending of the letter "manifested a possibility of future dealings and, perhaps, a renewed hope on [customer's] part of eventually realizing the projected profits;" and (3) "[a]s long as business relations were ongoing, [customer]

might be allayed from registering complaints with the authorities").

The same cannot be said for Counts 2 and 3, which were based on transmissions from Mr. Mayrsohn to Mr. Evans requesting payment on June 27 and July 3, 1997. By the time these transmissions were sent, Jagar had stopped making payments, PDI had sent the Ex-Im Bank its "Report of Overdue Accounts under Short-Term Policies" (which indicated that Jagar was 120 days late on some invoices), and Mr. Evans was not responding to Mr. Mayrsohn's communications. There has to be an end to every scheme, even under the "lulling" rationale, and Counts 2 and 3 are beyond any rational stopping point. At best, the transmissions charged in Counts 2 and 3 constitute collection letters which are insufficient under cases like *Georgalis*.[7]

IV. Conclusion

The jury's guilty verdict on Count 1 stands. Judgment of acquittal is entered in favor of Mr. Evans on Counts 2 and 3.

Sentencing on Count 1 is set for August 20, 2004, at 9:00 a.m. The parties should be prepared to address how restitution and the loss calculations under the Sentencing Guidelines are affected by (1) the expiration of the Ex-Im Bank policy, (2) the incorrect statement made by PDI and Mr. Mayrsohn in the claim filed with the Ex-Im Bank

[7] Although the government has never formally conceded that the evidence on Counts 2 and 3 is legally insufficient, it acknowledged during the Rule 29 argument that it had a weaker case on these charges. Tr. of Jan. 27, 2003, at 57, 59.

about when the first shipment was made to Jagar, and (3) the possibly improper or unwarranted payment of PDI's claim by the Ex-Im Bank.

DONE and ORDERED this 27th day of May, 2004, in chambers at Miami, Florida.

/s/ Adalberto Jordan
Adalberto Jordan
United States District Judge

cc: Counsel of record and U.S. Probation

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-10624-EE

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HUBERT GARLAND EVANS,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

(Filed Jan. 31, 2007)

BEFORE: PRYOR and FAY, Circuit Judges, and STEELE,*

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

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* The Honorable William H. Steel, United States District Court for the Southern District of Alabama, sitting by designation.

ENTERED FOR THE COURT:

/s/ William H. Pryor
UNITED STATES
CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 02-20451-CR-JORDAN(s)
18 U.S.C. § 1343

UNITED STATES OF AMERICA

v.

HUBERT GARLAND EVANS /

SUPERSEDING INDICTMENT

The Grand Jury charges that:

GENERAL ALLEGATIONS

At all times relevant to this Superseding Indictment:

1. The Export-Import Bank of the United States (the "Ex-Im Bank"), an agency of the United States with its principal offices located in Washington, D.C., aided in financing and facilitating the export of goods from the United States to other countries. As part of this mission, the Ex-Im Bank provided, among other things, export credit insurance against non-payment by foreign buyers.

2. Produce Direct, Inc. ("PDI") was a division of Mayrsohn International Trading Co., Inc., an entity incorporated in the State of New York. PDI engaged in the business of exporting fresh fruits and vegetables on a wholesale basis to Caribbean and Central American countries. PDI had a place of business located in Hialeah, Florida.

3. Jagar Limited ("Jagar") was an entity incorporated in the Commonwealth of the Bahamas. Jagar had a

place of business located in Nassau, Bahamas. Jagar was engaged in the wholesale and retail business of selling, among other things, fruits and vegetables in the Bahamas.

4. Defendant **HUBERT GARLAND EVANS,** a citizen of the United States and the Bahamas, was the President and a Director of the Board of Jagar. He was responsible for Jagar's day-to-day operations.

5. From about August 1993 to about July 1997, Jagar was one of the largest clients of PDI. Jagar purchased, using a line of credit extended by PDI, up to approximately $6 million worth of fruits and vegetables a year from PDI.

6. To protect its financial interest, PDI sought and obtained an export credit insurance policy from the Ex-Im Bank in 1995, which was renewed in 1996. The insurance policy provided PDI, in substantial part, protection against loss from Jagar's failure to meet its payment obligations to PDI. The Ex-Im Bank required PDI to obtain and submit Jagar's financial statements in support of PDI's application for the credit insurance policy and its renewal policy.

7. After issuing its original export credit insurance policy to PDI in 1995, the Ex-Im Bank renewed the policy issued to PDI in 1996 to continue the coverage for any non-payment by Jagar to PDI.

8. In reviewing PDI's application for the credit insurance renewal in 1996, the Ex-Im Bank considered and relied upon Jagar's internally generated and submitted financial statements for the year ended June 30, 1996. These financial statements falsely showed Jagar's business to be solvent and profitable, and that its overall financial condition continued to be satisfactory.

9. Beginning in early 1997, Jagar began to continuously lag behind in making full payments to PDI on the outstanding invoices. On repeated occasions, defendant **HUBERT GARLAND EVANS** falsely represented to PDI that Jagar would be able to pay the outstanding invoices.

10. On or about February 20, 1997, the accounting firm of Deloitte & Touche in Nassau, Bahamas stated in its review report of Jagar's financial statements as of June 30, 1996, that there was "substantial doubt" that Jagar would be able to continue as a "going concern." Jagar and defendant **HUBERT GARLAND EVANS** never disclosed to PDI or the Ex-Im Bank the Deloitte & Touche review report or the review report's conclusion that Jagar was in very poor financial condition.

11. On or about June 16, 1997, Jagar made its final payment to PDI; there was an outstanding balance of more than $1.1 million owed to PDI.

12. On or about September 17, 1997, PDI submitted a Notice of Claim and Proof of Loss to the Ex-Im Bank for a net loss of $1,075,774.64.

COUNTS 1-3

Wire Fraud
(18 U.S.C. § 1343)

13. The allegations set forth in paragraphs 1 through 12 of this Superseding Indictment are realleged and incorporated by reference as though fully set forth herein.

14. From in or around August 1996 to in or around July 1997, at Miami-Dade County, in the Southern District of Florida, and elsewhere, the defendant,

HUBERT GARLAND EVANS,

knowingly and willfully devised and intended to devise a scheme and artifice to defraud and to obtain money and property from others, that is, approximately $1,075,774.64 from PDI and the Ex-Im Bank, by means of materially false and fraudulent pretenses, representations and promises, well knowing that the pretenses, representations and promises were false and fraudulent when made.

The Scheme and Artifice to Defraud

15. Sometime prior to September 4, 1996, defendant **HUBERT GARLAND EVANS** caused the preparation of Jagar's internally generated balance sheet and statement income and retained earnings for the year ended June 30, 1996. These financial statements materially misrepresented Jagar's financial condition in that they failed to disclose an outstanding debt owed by Jagar to a financial institution.

16. On or about September 4, 1996, defendant **HUBERT GARLAND EVANS** caused the submission, via facsimile, of Jagar's internally generated and materially false financial statements for the year ended June 30, 1996 to the Ex-Im Bank, through PDI, in support of PDI's 1996 application for the export credit renewal insurance policy.

17. Defendant **HUBERT GARLAND EVANS** failed to disclose to PDI and the Ex-Im Bank the true financial condition of Jagar, by failing to disclose the existence of

the Deloitte & Touche review report and the review report's conclusion that Jagar was in very poor financial condition. Defendant **HUBERT GARLAND EVANS** omitted to disclose this information so that Jagar could continue to purchase, using the line of credit extended by PDI, substantial amounts of fresh fruits and vegetables from PDI, and to delay PDI's efforts to collect on Jagar's escalating outstanding invoices.

18. To lull PDI and the Ex-Im Bank and prevent them from detecting Jagar's true financial condition and the falsity of Jagar's submitted financial statements, on repeated occasions, defendant **HUBERT GARLAND EVANS** falsely represented and caused to be falsely represented to PDI that Jagar was in good financial condition, and that Jagar had the financial ability to pay its escalating outstanding balance to PDI.

19. Through the scheme and artifice to defraud described herein, defendant **HUBERT GARLAND EVANS** caused the outstanding balance owed to PDI, which was, in substantial part, insured by the Ex-Im Bank, to add up to approximately $1,075,774.64.

Acts in Execution of the Scheme and Artifice to Defraud

20. On or about the dates specified as to each count below, the defendant, **HUBERT GARLAND EVANS**, for the purpose of executing the aforesaid scheme and artifice to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations and promises, did knowingly transmit and cause to be transmitted, by means of wire communications in interstate and foreign commerce, certain writings, signs,

signals, pictures, and sounds, as more particularly described in each count below:

COUNT	APPROX. DATE	DESCRIPTION OF WIRE COMMUNICATION
1	May 22, 1997	Letter transmitted via facsimile from M.M. of PDI, located in Hialeah, Florida, to Jagar, located in Nassau, Bahamas, confirming a meeting with defendant **HUBERT GARLAND EVANS** to discuss the status of outstanding invoices and payments
2	June 27, 1997	Letter translated via facsimile from M.M. of PDI, located in Hialeah, Florida, to the attention of defendant **HUBERT GARLAND EVANS** and another Jagar employee at Jagar's place of business located in Nassau, Bahamas, enclosing a statement of Jagar's account and requesting payment
3	July 3, 1997	Letter transmitted via facsimile from M.M. of PDI, located in Hialeah, Florida, to the attention of defendant **HUBERT GARLAND EVANS** and another Jagar employee at Jagar's place of business located in Nassau, Bahamas, regarding the status of Jagar's account

All in violation of Title 18, United States Code, Section 1343.

A TRUE BILL

/s/ [Illegible]
FOREPERSON

/s/ Kent T. Noto for
MARCOS DANIEL JIMINEZ
UNITED STATES ATTORNEY

/s/ [Illegible]
RICHARD HONG
ASSISTANT UNITED STATES ATTORNEY

PRODUCE DIRECT, INC.

MIAMI, FLORIDA
MAY 22, 1997

TO: JAGAR
ATT: DIANE
FROM: MARK

DEAR DIANE,

JUST A SHORT NOTE TO CONFIRM OUR MEETING TOGETHER WITH MR. EVANS ON MONDAY AT 2:30 P.M. AT YOUR OFFICES.

FOR YOUR REVIEW I'VE ENCLOSED SOME PRELIMINARY INFORMATION, A REPORT OF THE CURRENT RECEIVABLES WITH THE AGING FROM INVOICE DATE. AS DISCUSSED, WE MUST STAY WITHIN 120 DAYS FOR THE EX-IM BANK.

YOUR ACCOUNT IS RIGHT NOW AT THE LIMIT AND WE SHOULD BE RECEIVING YOUR PAYMENTS NOW IN ORDER TO KEEP UP WITH THE SCHEDULE.

WE HOPE THAT YOU ARE PREPARING SOMETHING TO SEND US FOR THIS WEEK AND CAN CONTINUE TO STAY WITHIN THE 120 DAY EX-IM REQUIREMENT.

WE LOOK FORWARD TO A POSITIVE AND SUCCESSFUL MEETING TOGETHER.

SINCERELY,

/s/ Mark
MARK MAYRSOHN
PRESIDENT

PRODUCE DIRECT
OPEN INVOICE REPORT

Jagar Ltd. As of May 22, 1997

Type	Date	Num	Due Date	Aging	Open Balance	Balance		
Invoice	1/20/97	40297	2/19/97	122	$18,546.20	$18,546.20		
Invoice	1/20/97	41897	2/19/97	122	$6,450.00	$24,996.20		
Invoice	1/20/97	46097	2/19/97	122	$2,515.40	$27,511.60		
Invoice	1/21/97	42597	2/20/97	121	$12,015.90	$39,527.50		
Invoice	1/21/97	42697	2/20/97	121	$200.00	$39,727.50		
Invoice	1/22/97	40197	2/21/97	120	$9,653.15	$49,380.65		
Invoice	1/22/97	45197	2/21/97	120	$7,133.05	$56,513.70		
Invoice	1/22/97	45597	2/21/97	120	$100.00	**$56,613.70**	**$56,613.70**	**Due Thurs 22**
Invoice	1/23/97	46497	2/22/97	119	$12,567.50	$69,181.20		
Invoice	1/23/97	46997	2/22/97	119	$11,275.85	$80,457.05		
Invoice	1/23/97	46597	2/22/97	119	$100.00	**$80,557.05**	**$ 23,943.35**	**Due Fri, 23**
Invoice	1/24/97	47897	2/23/97	118	$9,317.75	$89,874.80		
Invoice	1/24/97	47997	2/23/97	118	$100.00	$89,974.80		
Invoice	1/27/97	51197	2/26/97	115	$14,360.15	**$104,334.95**	**$ 23,777.90**	**Due Mon, 26**
Invoice	1/28/97	52097	2/27/97	114	$10,307.15	$114,642.10		
Invoice	1/28/97	56097	2/27/97	114	$1,698.10	$116,340.20		
Invoice	1/29/97	54597	2/28/97	113	$6,641.50	$122,981.70		
Invoice	1/29/97	55697	2/28/97	113	$676.00	$123,657.70		
Invoice	1/29/97	55797	2/28/97	113	$11,295.81	$134,953.51		
Invoice	1/30/97	55897	3/1/97	112	$11,429.35	**$146,382.86**	**$ 42,047.91**	**Due Fri, 30**
Invoice	2/3/97	61597	3/5/97	108	$11,616.85	$157,999.71		
Invoice	2/3/97	61697	3/5/97	108	$15,741.70	$173,741.41		
Invoice	2/3/97	61897	3/5/97	108	$10,194.74	$183,936.15		
Invoice	2/3/97	66097	3/5/97	108	$1,293.60	$185,229.75		
Invoice	2/4/97	62397	3/6/97	107	$13,296.80	$198,526.55		
Invoice	2/5/97	65897	3/7/97	106	$11,926.30	$210,452.85		
Invoice	2/6/97	67697	3/8/97	105	$13,065.75	$223,518.60		
Invoice	2/7/97	68697	3/9/97	104	$4,148.35	$227,666.95		
Invoice	2/10/97	71197	3/12/97	101	$9,218.15	$236,885.10		
Invoice	2/10/97	71297	3/12/97	101	$13,381.95	$250,267.05		
Invoice	2/10/97	71797	3/12/97	101	$737.20	$251,004.25		
Invoice	2/10/97	72297	3/12/97	101	$2,326.35	$253,330.60		
Invoice	2/10/97	76097	3/12/97	101	$2,178.30	$255,508.90		
Invoice	2/11/97	72797	3/13/97	100	$6,008.50	$261,517.40		
Invoice	2/11/97	73297	3/13/97	100	$16,185.42	$277,702.82		
Invoice	2/12/97	72897	3/14/97	99	$12,601.35	$290,304.17		
Invoice	2/12/97	74297	3/14/97	99	$6,306.50	$296,610.67		
Invoice	2/12/97	75897	3/14/97	99	$298.88	$296,909.55		
Invoice	2/12/97	76597	3/14/97	99	$4,169.60	$301,079.15		
Invoice	2/12/97	77497	3/14/97	99	$14,837.05	$315,916.20		
Invoice	2/14/97	78897	3/16/97	97	$13,728.38	$329,644.58		
Invoice	2/17/97	81797	3/19/97	94	$12,619.45	$342,264.03		
Invoice	2/17/97	86097	3/19/97	94	$2,169.80	$344,433.83		
Invoice	2/19/97	84097	3/21/97	92	$5,307.75	$349,741.58		
Invoice	2/19/97	85297	3/21/97	92	$7,957.55	$357,699.13		

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Invoice	2/19/97	85497	3/21/97	92	$9,967.27	$367,666.40
Invoice	2/19/97	85697	3/21/97	92	$2,676.00	$370,342.40
Invoice	2/20/97	86397	3/22/97	91	$7,936.05	$378,278.45
Invoice	2/20/97	86497	3/22/97	91	$3,246.70	$381,525.15
Invoice	2/24/97	91297	3/26/97	87	$15,926.50	$397,451.65
Invoice	2/24/97	91397	3/26/97	87	$684.51	$398,136.16
Invoice	2/25/97	91197	3/27/97	86	$10,575.85	$408,712.01
Invoice	2/25/97	91697	3/27/97	86	$10,611.05	$419,323.06
Invoice	2/26/97	93697	3/28/97	85	$9,750.95	$429,074.01
Invoice	2/26/97	93997	3/28/97	85	$1,404.65	$430,478.66
Invoice	2/27/97	94697	3/29/97	84	$12,900.65	$443,379.31
Invoice	2/28/97	96597	3/30/97	83	$9,710.05	$453,089.36
Invoice	3/3/97	100297	4/2/97	80	$5,539.50	$458,628.86
Invoice	3/3/97	100897	4/2/97	80	$11,909.05	$470,537.91
Invoice	3/3/97	100997	4/2/97	80	$11,133.20	$481,671.11
Invoice	3/3/97	106097	4/2/97	80	$1,649.10	$483,320.21
Invoice	3/4/97	101897	4/3/97	79	$11,527.40	$494,847.61
Invoice	3/5/97	104397	4/4/97	78	$11,446.10	$506,293.71
Invoice	3/6/97	105197	4/5/97	77	$10,101.90	$516,395.61
Invoice	3/6/97	106397	4/5/97	77	$11,244.12	$527,639.73
Invoice	3/10/97	110197	4/9/97	73	$13,998.24	$541,637.97
Invoice	3/10/97	110897	4/9/97	73	$10,221.15	$551,859.12
Invoice	3/10/97	110997	4/9/97	73	$14,792.25	$566,651.37
Invoice	3/11/97	111397	4/10/97	72	$11,078.91	$577,730.28
Invoice	3/11/97	111497	4/10/97	72	$7,913.00	$585,643.28
Invoice	3/12/97	111697	4/11/97	71	$5,553.00	$591,196.28
Invoice	3/12/97	113597	4/11/97	71	$12,371.95	$603,568.23
Invoice	3/12/97	113697	4/11/97	71	$14,097.30	$617,665.53
Invoice	3/17/97	1E+07	4/16/97	66	$9,853.60	$627,519.13
Invoice	3/17/97	121497	4/16/97	66	$11,412.30	$638,931.43
Invoice	3/17/97	121697	4/16/97	66	$10,417.95	$649,349.38
Invoice	3/17/97	126097	4/16/97	66	$2,100.00	$651,449.38
Invoice	3/17/97	121597	4/16/97	66	$12,039.00	$663,488.38
Invoice	3/19/97	124397	4/18/97	64	$13,321.30	$676,809.68
Invoice	3/19/97	124497	4/18/97	64	$13,621.94	$690,431.62
Invoice	3/20/97	126297	4/19/97	63	$9,733.87	$700,165.49
Invoice	3/21/97	126997	4/20/97	62	$11,007.60	$711,173.09
Invoice	3/24/97	130997	4/23/97	59	$9,864.20	$721,037.29
Invoice	3/24/97	131097	4/23/97	59	$16,980.50	$738,017.79
Invoice	3/24/97	131197	4/23/97	59	$5,630.00	$743,647.79
Invoice	3/24/97	136097	4/23/97	59	$1,938.10	$745,585.89
Invoice	3/25/97	131297	4/24/97	58	$3,827.65	$749,413.54
Invoice	3/25/97	131397	4/24/97	58	$15,483.45	$764,896.99
Invoice	3/25/97	132597	4/24/97	58	$3,914.25	$768,811.24
Invoice	3/26/97	133197	4/25/97	57	$11,794.42	$780,605.66
Invoice	3/31/97	140297	4/30/97	52	$9,224.77	$789,830.43
Invoice	3/31/97	140997	4/30/97	52	$11,365.90	$801,196.33

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Invoice	3/31/97	141097	4/30/97	52	$9,812.40	$811,008.73
Invoice	3/31/97	141197	4/30/97	52	$17,004.15	$828,012.88
Invoice	4/1/97	146097	5/1/97	51	$1,700.70	$829,713.58
Invoice	4/2/97	144197	5/2/97	50	$9,657.30	$839,370.88
Invoice	4/3/97	144997	5/3/97	49	$12,563.65	$851,934.53
Invoice	4/4/97	146497	5/4/97	48	$11,205.40	$863,139.93
Invoice	4/7/97	2E+06	5/7/97	45	$5,558.25	$868,698.18
Invoice	4/7/97	150697	5/7/97	45	$14,728.10	$883,426.28
Invoice	4/7/97	150797	5/7/97	45	$12,265.45	$895,691.73
Invoice	4/7/97	150897	5/7/97	45	$11,178.90	$906,870.63
Invoice	4/7/97	156097	5/7/97	45	$2,178.30	$909,048.93
Invoice	4/9/97	153697	5/9/97	43	$11,491.40	$920,540.33
Invoice	4/10/97	154797	5/10/97	42	$12,227.68	$932,768.01
Invoice	4/10/97	156297	5/10/97	42	$1,917.00	$934,685.01
Invoice	4/14/97	160297	5/14/97	38	$10,788.90	$945,473.91
Invoice	4/14/97	160397	5/14/97	38	$12,403.66	$957,877.57
Invoice	4/14/97	161297	5/14/97	38	$12,751.25	$970,628.82
Invoice	4/14/97	161397	5/14/97	38	$11,429.10	$982,057.92
Invoice	4/14/97	161497	5/14/97	38	$14,443.90	$996,501.82
Invoice	4/14/97	166097	5/14/97	38	$2,447.90	$998,949.72
Invoice	4/15/97	163598	5/15/97	37	$10,612.54	$1,009,562.26
Invoice	4/16/97	164097	5/16/97	36	$12,285.75	$1,021,848.01
Invoice	4/17/97	160197	5/17/97	35	$14,837.30	$1,036,685.31
Invoice	4/17/97	165297	5/17/97	35	$12,505.21	$1,049,190.52
Invoice	4/21/97	170797	5/21/97	31	$13,349.15	$1,062,539.67
Invoice	4/21/97	170897	5/21/97	31	$12,876.15	$1,075,415.82
Invoice	4/21/97	176097	5/21/97	31	$2,179.80	$1,077,595.62
Invoice	4/22/97	170697	5/22/97	30	$13,368.10	$1,090,963.72
Invoice	4/23/97	172997	5/23/97	29	$12,886.90	$1,103,850.62
Invoice	4/24/97	173897	5/24/97	28	$14,160.54	$1,118,011.16
Invoice	4/24/97	173997	5/24/97	28	$13,753.24	$1,131,764.40

Total Jagar Ltd. **$1,131,764.40**

PRODUCE DIRECT, INC.

MIAMI, FLORIDA
JUNE 27, 1997

TO: JAGAR
ATT: GARLAND/DIANE
FROM: MARK

PLEASE FIND ENCLOSED STATEMENT OF YOUR ACCOUNT TO DATE WITH YOUR RECENT PAYMENT OF $12,015.90 DATED JUNE 16, 1997, THE BALANCE NOW STANDS AT $1,092,236.90.

THROUGH OUR MUTUAL EFFORTS AND OUR 10-PAGE FAX SENT TO YOU ON JUNE 4, 1997, WE PROPOSE TO [sic] CREDIT OF $26,727.00 REPRESENTING THE FINAL TOTAL NET CREDITS FOR SPOILAGE AND PRICE DISCOUNTS DUE TO YOUR ACCOUNT AS EXPLAINED IN THIS FAX.

THIS CREDIT WILL BRING YOUR OUTSTANDING BALANCE DOWN TO $1,065,509.90. WE TRUST THAT YOU ARE IN AGREEMENT WITH THIS FIGURE AND CAN CONTINUE TO WORK DOWN THE BALANCE WITH YOUR PAYMENTS.

IF THERE ARE ANY DISCREPANCIES TO THIS TOTAL PLEASE BRING THEM TO OUR ATTENTION IMMEDIATELY.

THE EX-IM BANK HAS TODAY BROUGHT TO OUR ATTENTION THAT THE OLDEST INVOICE FROM YOUR ACCOUNT IS NOW 156 DAYS OLD.

YOUR "SUBSTANTIAL" PAYMENT THIS WEEK IS STRONGLY NEEDED TO SHOW THE EX-IM BANK OF

YOUR COOPERATION IN PAYING DOWN THE BALANCE.

WE LOOK FORWARD TO YOUR PROMPT PAYMENT. THANKING YOU IN ADVANCE FOR YOUR COOPERATION.

SINCERELY,

/s/ Mark Mayrsohn
MARK MAYRSOHN
PRESIDENT

CC: BERNARD MAYRSOHN
CC: EX-IM BANK

PRODUCE DIRECT, INC.

MIAMI, FLORIDA
JULY 3, 1997

TO: JAGAR
ATT: DIANE/GARLAND
FROM: MARK

I'M SURE YOU'RE AWARE HOW DISAPPOINTED WE ARE THAT YOU DO NOT HAVE A CHECK READY TO SEND TO US.

IN THE MEANTIME, HOWEVER, WE NEED TO WORK OUT THE CREDIT SITUATION. OUR FAX OF JUNE 4, 1997 SHOWS $26,727.00 NET CREDIT DUE.

YOUR OWN REPORT GIVEN TO ME IN YOUR OFFICE SHOWS $79,755.97 CREDITS WITH A TOTAL GRANTED FROM PRODUCE DIRECT (IN 1996) OF $38,011.25 OR A NET CREDIT DUE OF $41,744.72.

THIS ABOVE FIGURE DOES NOT INCLUDE THE 1997 CREDITS GIVEN TO JAGAR ON PINEAPPLES AS SHOWN IN THE JUNE 4 FAX TOTALING $9,193.00. THEREFORE BY YOUR OWN FIGURES THE TOTAL CREDITS DUE ARE $32,551.72.

IN SHORT, OUR FIGURE FOR NET CREDITS IS $26,727.00 AND YOURS IS $32,551.72.

PLEASE CONTACT US WITHIN THE NEXT 5 DAYS TO RESOLVE THIS MATTER.

REGARDS,

/s/ Mark Mayrsohn
MARK MAYRSOHN
PRESIDENT
ENC.